No. 94-623-CFX
Status: GRANTED

Title: Vimar Seguros Y Reaseguros, S.A., Petitioner
v.
M/V Sky Reefer, Her Engines, etc., et al.

Docketed:
October 5, 1994

Court: United States Court of Appeals for the First Circuit

Counsel for petitioner: McDermott III,Stanley

Counsel for respondent: Walsh Jr.,Thomas H.

Entry	Date	Note	Proceedings and Orders
1	Oct 5 1994	G	Petition for writ of certiorari filed.
2	Nov 4 1994	G	Motion of Maritime Law Association of the United States for leave to file a brief as amicus curiae filed.
3	Nov 4 1994		Brief of respondents M/V Sky Reefer, et al. in opposition filed.
4	Nov 8 1994		DISTRIBUTED. November 23, 1994 (Page 24)
5	Nov 9 1994	X	Reply brief of petitioner filed.
6	Nov 28 1994		Motion of Maritime Law Association of the United States for leave to file a brief as amicus curiae GRANTED. Justice Breyer OUT.
7	Nov 28 1994		Petition GRANTED. Justice Breyer OUT.
			**********
8	Jan 12 1995		Joint appendix filed.
9	Jan 12 1995		Brief of petitioner Vimar Seguros y Reaseguros, S.A. filed.
10	Jan 12 1995	G	Motion of American Association of Exporters and Importers for leave to file a brief as amicus curiae filed.
11	Jan 23 1995		Motion of American Association of Exporters and Importers for leave to file a brief as amicus curiae GRANTED. Justice Breyer OUT.
12	Jan 30 1995		SET FOR ARGUMENT MONDAY, MARCH 20, 1995. (2ND CASE).
13	Feb 1 1995		CIRCULATED.
14	Feb 10 1995		Record filed.
		*	Partial record proceedings United States Court of Appeals for the First Circuit.
15	Feb 17 1995		Record filed.
		*	Original record proceedings United States District Court for the District of Massachusetts.
16	Feb 21 1995	X	Brief amici curiae of American Steamship Owners Mutual Protection Assn., et al. filed.
17	Feb 21 1995		Brief of respondent M/V Sky Reefer, etc., et al. filed.
18	Mar 6 1995	X	Reply brief of petitioner filed.
19	Mar 20 1995		ARGUED.

Supreme Court, U.S.
FILED

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No. ____

In the Supreme Court of the United States

OCTOBER TERM, 1994

VIMAR SEGUROS Y REASEGUROS, S.A., PETITIONER

v.

M/V SKY REEFER, HER ENGINES, ETC.,
AND M.H. MARITIMA, S.A., RESPONDENTS

**Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a foreign arbitration clause in a maritime bill of lading is invalid under Section 3(8) of the Carriage of Goods by Sea Act, 46 U.S.C. 1303(8).

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

In addition to petitioner Vimar Seguros y Reaseguros, Bacchus Associates was an appellant in the court of appeals. Vimar has no parent or subsidiaries.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. _____

VIMAR SEGUROS Y REASEGUROS, S.A., PETITIONER

v.

M/V SKY REEFER, HER ENGINES, ETC.,
AND M.H. MARITIMA, S.A., RESPONDENTS

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

Vimar Seguros y Reaseguros, S.A., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-13a) is reported at 29 F.3d 727. The opinion of the district court on the merits (App., *infra*, 14a-26a) is not officially reported but is available at 1993 WL 13743 (D. Mass. 1993), and its opinion certifying the legal issue for immediate appeal under 28 U.S.C. 1292(b) (App., *infra*, 27a-30a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1994. A petition for a writ of certiorari is due on October 5, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 3(8) of the Carriage of Goods by Sea Act, 46 U.S.C. 1303(8), provides:

> Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties or obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect.

2. Section 2 of the Federal Arbitration Act, 9 U.S.C. 2, provides in pertinent part;

> A written provision in any maritime transaction * * * to settle by arbitration a controversy thereafter arising out of such contract * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT

A. Statutory Framework

The Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. § 1300 *et. seq.*, was enacted in 1936 "to define by law the rights and liabilities of water carriers and shippers in foreign commerce." *See Uniform Ocean Bills of Lading — Hague Rules*, H.R. Rep. No. 2218, 74th Cong., 2d Sess. 1 (1936). Modeled on the International Convention for the

Verification of Certain Rules of Law Relating to Bills of Lading (the "Hague Rules"), COGSA prescribes both the rights and responsibilities of common carriers (the companies that own and operate the ocean-going vessels that carry cargo for hire), and the rights and responsibilities of shippers and consignees (the companies that own the cargo shipped on board the carriers' vessels).

The statute establishes a carefully-crafted balance of rights and duties. On the one hand, COGSA imposes on the carrier the nondelegable obligation "to exercise due diligence to * * * [m]ake the vessel seaworthy" before and at the beginning of the voyage (46 U.S.C. 1303(1)), and to "properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried" (46 U.S.C. 1303(2)). On the other hand, the statute immunizes the carrier from liability for losses resulting from numerous causes (46 U.S.C. 1304(2)(a) through (q)), including, for example, the "[a]ct, neglect or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship" (46 U.S.C. 1304(2)(a)), or "[f]ire, unless caused by the actual fault or privity of the carrier" (46 U.S.C. 1304(2)(b)). The statute also limits a carrier's liability to $500 per package or customary freight unit unless the cargo owner declares the value of the cargo in advance. 46 U.S.C. 1304(5).

COGSA also regulates "bills of lading" — the documents that evidence the transportation contract between the carrier and the cargo owner.[1] By its terms, COGSA applies to

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[1] A bill of lading is typically a single-page form document that the carrier or its agent issues to the shipper at the port of loading. See, *e.g.*, Court of Appeals Appendix ("C.A. App.") A44-A45. It acknowledges the carrier's receipt of the cargo for transportation to a designated port of discharge at an agreed freight rate. It is frequently a negotiable document of title issued to order, which the shipper negotiates to its buyer incident to the

"[e]very bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade * * *." 46 U.S.C. 1300. Because bills of lading had historically contained various clauses designed to insulate the carrier from any liability for cargo damage — in conflict with COGSA — the statute sought to make bills of lading simple and uniform,[2] and — more pertinently — it sought to restrict a carrier's ability to avoid liability by inserting limiting conditions in the bill of lading.[3] Toward that end, Section 3(8) of COGSA, 46 U.S.C. 1303(8), specifically invalidates

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sale of the goods. It is also the contract of carriage between the carrier and the shipper (and subsequent holders of the bill of lading). The buyer or its consignee takes delivery of the goods from the carrier at the port of discharge after it returns the bill of lading to the carrier or its agents. The reverse side of the bill of lading typically contains numerous boilerplate terms imposed unilaterally by the carrier. See generally *Organes Enter. Inc.* v. *M/V Khalij Frost*, No. 88 Civ. 4710, 1989 WL 37660 (S.D.N.Y. April 12, 1989).

[2] As the House report explained:

> The uniformity and simplification of bills of lading will be of immense value to shippers who will be relieved of the necessity of closely examining all bills of lading to determine the exceptions contained therein to ascertain their rights and responsibilities; to underwriters who insure the cargo and are met with the same difficulties; and to bankers who extend credit upon the bills of lading.

Uniform Ocean Bills of Lading — Hague Rules, H.R. Rep. No. 2218, 74th Cong., 2d Sess., 7 (1936).

[3] See Note, *Arbitration Clauses: Potential Conflicts With the Carriage of Goods By Sea Act* ("*Arbitration Clauses*"), 21 Colum. J. Transnat'l L. 157 (1982).

any bill-of-lading clause that lessens the carrier's liability under COGSA:

> Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect.

B. The Present Controversy

1. Petitioner, a Spanish insurance company, is the subrogated cargo underwriter of Bacchus Associates, a New York partnership and a wholesale distributor of fruit in New England.[4] In February 1991, Bacchus contracted with a Moroccan supplier, Galaxie Negoce S.A. ("Galaxie"), to buy a shipload of Moroccan oranges, and chartered the M/V Sky Reefer, a refrigerated cargo ship, to transport the fruit from Morocco to New England. The Sky Reefer is owned by respondent Maritima, a Panamanian corporation that is affiliated with certain Japanese shipping companies that chartered, operated, and managed the vessel.[5]

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[4] Petitioner issued to Bacchus a policy of marine cargo insurance that insured Bacchus against loss or damage to its goods. Bacchus submitted a claim for the damaged fruit in question to petitioner under that insurance policy and petitioner became subrogated to Bacchus' rights against respondents when it paid the major part of Bacchus' claim (in the sum of $733,442.90). C.A. App. A8, A37-A38.

[5] Respondent Maritima, the vessel owner, initially time-chartered the Sky Reefer on a 3-year basis to Honma Senpaku Co., Ltd. ("Honma"), of Tokyo. C.A. App. A46-A55. Honma in turn chartered the vessel to Gyogyo Kaisha, Ltd. ("Nichiro Gyogyo"), of Tokyo (*id.* at A56-A65), which thereafter hired

At the time the oranges were placed on board the Sky Reefer, local agents acting for the vessel's manager, Nichiro Corporation ("Nichiro"), a Japanese corporation based in Tokyo, issued a bill of lading to Galaxie, the shipper, stating that 2,058 pallets of oranges had been shipped on board the vessel from Agadir to New Bedford, Massachusetts. The bill of lading — reflecting the contract of carriage between petitioner and respondents — was a standard Nichiro form. See C.A. App. A44-A45. Among its boilerplate provisions was a clause requiring that any dispute arising from the carriage of goods be arbitrated in Japan, pursuant to Japanese law (C.A. App. A45):

> 3. **Governing Law and Arbitration**
>
> (1) The contract evidenced by or contained in this Bill of Lading shall be governed by Japanese law.
>
> (2) Any dispute arising from this Bill of Lading shall be referred to arbitration in Tokyo by the Tokyo Maritime Arbitration Commission (TOMAC) of The Japan Shipping Exchange Inc., in accordance with the Rules of TOMAC and any amendments thereto, and the award by the arbitrators shall be final and binding on both parties.

Like virtually all bills of lading, see *supra* pages 3-4 n.1, the Japanese law-and-arbitration clause was not the product of arm's length negotiations between Nichiro's local agents in Agadir and Galaxie, the Moroccan shipper. Nichiro's agents simply signed and delivered the bill of lading to the shipper

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Nichiro Corporation to manage the vessel. Nichiro chartered the vessel to Baccus for the voyage in question. *Id.* at A66-A68.

once the cargo had been loaded on board the vessel. C.A. App. A39 ¶ 15.[6]

The vessel duly sailed from Agadir to New Bedford with the cargo. Once the goods were en route, the shipper tendered the bill of lading to Bacchus, in accordance with the letter of credit opened in the shipper's favor. Upon receiving the bill of lading, Bacchus learned for the first time of the foreign arbitration clause. C.A. App. A39 ¶ 15.

By the time the ship arrived in New Bedford, the pallets of oranges had shifted in the cargo holds, crushing thousands of boxes of oranges, and resulting in a cargo loss in excess of $1 million. The apparent cause of the damage was the crew's failure to lash and brace the stow sufficiently for a trans-Atlantic crossing in mid-winter. C.A. App. A36-A38.

2. On December 20, 1991, petitioner filed suit in the United States District Court for the District of Massachusetts, naming respondent Maritima *in personam* and respondent M/V Sky Reefer *in rem*.[7] Invoking the foreign arbitration

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[6] Although the bill of lading purported to impose Japanese law and arbitration, its drafters recognized that COGSA might well apply nonetheless. The bill of lading stated (C.A. App. A45):

> 19. **Local Clause**
>
> In case this Bill of Lading covers the Goods moving to or from the U.S.A. and it shall be adjudged that the Japanese law does not govern this Bill of Lading, then the provisions of the U.S. Carriage of Goods Act 1936 shall govern before the Goods are loaded on and after they are discharged from the Vessel and throughout the entire time during which the Goods are in the actual custody of the Carrier.

[7] Bacchus was also a plaintiff in the litigation to recover its uninsured loss (approximately $250,000). See C.A. App. A6-

clause in the bill of lading, respondents moved to stay the action pending arbitration in Japan. Petitioner opposed the motion, contending that enforcement of the foreign arbitration clause would "lessen" the carrier's liability within the meaning of Section 3(8) of COGSA. See C.A. App. A35-A40.

The district court granted the motion (App., *infra*, 14a-26a), holding that Section 3(8) does not invalidate foreign arbitration clauses in maritime bills of lading. The court explained (*id.* at 18a) that Section 3(8) must give way to the Federal Arbitration Act, which "specifically refers to bills of lading in defining the types of agreements which might contain valid and irrevocable arbitration clauses." The court recognized (*id.* at 17a) that the Eleventh Circuit had reached the opposite conclusion in *State Establishment for Agricultural Product Trading* v. *M/V Wesermunde*, 838 F.2d 1576, *cert. denied*, 488 U.S. 916 (1988). In the court's view, however, the Eleventh Circuit had acted "without proper regard for the Supreme Court's mandate that lower courts discard their historical distrust of arbitrators, and give effect to private dispute resolution tribunals" (*id.* at 18a).[8]

A10. For purposes of simplicity, we refer only to "petitioner."

[8] The district court thereafter certified the question for immediate appeal under 28 U.S.C. 1292(b) (App., *infra*, 27a-30a). The court explained (*id.* at 28a) that the question whether foreign arbitration clauses violate COGSA "is a question as to which there is substantial ground for difference of opinion." Indeed, the court observed (*ibid.*), "this court's ruling on the issue ran contrary to the decision by the United States Court of Appeals for the Eleventh Circuit in *State Establishment for Agricultural Trading* v. *M/V Wesermunde*, 838 F.2d 1576 (11th Cir. 1988)." Moreover, the court stated (App., *infra*, 28a), the issue presents "a question of statutory interpretation which is not fact-specific" and "involves a serious legal issue, on which courts have disagreed, which doubtless will arise in future cases."

3. The court of appeals affirmed (App., *infra*, 1a-13a). The court acknowledged (*id.* at 6a) that "§ 3(8) has been consistently used by federal courts to invalidate forum selection clauses in bills of lading governed by COGSA." It explained (*id.* at 9a), however, that the courts are "divided" on whether Section 3(8) likewise invalidates foreign arbitration clauses. Explicitly rejecting (*id.* at 10a) the contrary decision of the Eleventh Circuit in *Wesermunde*, the court of appeals elected to "join those courts upholding the validity of foreign arbitration clauses in bills of lading subject to COGSA" (*ibid.*).

Significantly, the court of appeals "recognize[d] * * * that absent the FAA, COGSA might operate to nullify foreign arbitration clauses in bills of lading" (App., *infra*, 10a n.5). The court surmised, however, that COGSA and the FAA were in "conflict" (*id.* at 11a), and it therefore applied "two canons of statutory interpretation" (*ibid.*) to resolve the conflict it perceived. First, the court noted, "a later enacted statute generally limits the scope of an earlier statute if the two laws conflict"; under that principle, "the FAA must be given priority over COGSA in light of the FAA's reenactment in 1947, eleven years after COGSA was passed." *Id.* at 11a-12a. Second, the court stated, "where two statutes conflict, * * * the specific statute ordinarily controls the general"; and under that principle, the FAA must again take precedence, since it "specifically validates arbitration clauses contained in maritime bills of lading," whereas Section 3(8) of COGSA "makes no reference to arbitration, or for that matter, forum selection clauses." *Id.* at 12a. In light of these statutory maxims — coupled with "the strong federal policy favoring arbitration" (*ibid.*) — the court held that "the FAA alone governs the validity of arbitration clauses, both foreign and domestic, and consequently removes them from the grasp of COGSA" (*id.* at 10a).

REASONS FOR GRANTING THE PETITION

The court of appeals has decided an important and recurring question of federal maritime law. Expressly rejecting the contrary decision of the Eleventh Circuit in *State Establishment for Agricultural Product Trading* v. *M/V Wesermunde*, 838 F.2d 1576, *cert. denied*, 488 U.S. 916 (1988), the court of appeals held that a foreign arbitration clause in a bill of lading must be enforced under the Federal Arbitration Act, notwithstanding Section 3(8) of COGSA. Applying two "canons of statutory interpretation" (App., *infra*, 11a), the court held that Section 2 of the FAA "removes" foreign arbitration clauses "from the grasp of COGSA."

The court of appeals' decision creates an untenable circuit conflict, depriving maritime businesses of the uniformity that is so essential to their commercial relations. The decision below is also deeply flawed. It rests on a faulty construction of both the FAA and COGSA. It unjustifiably abandons settled case law under Section 3(8). And if left undisturbed, it will undermine the fundamental purpose of COGSA: to promote "[t]he uniformity and simplification of bills of lading" in order to "relieve[]" shippers "of the necessity of closely examining all bills of lading to determine the exceptions contained therein to ascertain their rights and responsibilities." *Uniform Ocean Bills of Lading — Hague Rules*, H.R. Rep. No. 2218, 74th Cong., 2d Sess. 7 (1936). Further review is warranted.

A. The Court of Appeals' Decision Is Squarely In Conflict With The Eleventh Circuit's Decision In *Wesermunde*

As the court of appeals acknowledged (App., *infra*, 6a (emphasis added)), "§ 3(8) has been consistently used by federal courts to invalidate *forum selection* clauses in bills of

lading governed by COGSA."[9] These courts have recognized that "[a] clause making a claim triable only in a foreign court would almost certainly lessen liability * * * ." *Indussa Corp.* v. *S.S. Ranborg*, 377 F.2d 200, 203 (2d Cir. 1967) (invalidating bill-of-lading clause requiring suit against Norwegian carrier in Norway).[10] As Judge Friendly explained for the en banc court in *Indussa*, "[e]ven when the

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[9] See *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585, 604 (1991) (Stevens, J., dissenting) ("The Courts of Appeals, construing * * * the Carriage of Goods by Sea Act * * * have unanimously held invalid as limitations on liability forum-selection clauses requiring suit in foreign jurisdictions").

[10] Accord *Hughes Drilling Fluids* v. *M/V Luo Fu Shan*, 852 F.2d 840 (5th Cir. 1988) (invalidating bill-of-lading clause requiring suit against Chinese carrier in China), *cert. denied*, 489 U.S. 1033 (1989); *Conklin & Garrett, Ltd.* v. *M/V Finnrose*, 826 F.2d 1441, 1142-1144 (5th Cir. 1987) (invalidating bill-of-lading clause requiring suit against Finnish carrier in Finland under Finnish law); *Union Ins. Soc. of Canton, Ltd.* v. *S.S. Elikon*, 642 F.2d 721, 723-725 (4th Cir. 1981) (invalidating bill-of-lading clause requiring suit against German carrier in Germany under German law); *Underwriters at Lloyd's of London* v. *M/V Steir*, 773 F. Supp. 523 (D.P.R. 1991) (invalidating bill-of-lading clause requiring suit against French carrier in France); *C.A. Seguros Orinoco* v. *Naviera Transpapel, C.A.*, 677 F. Supp. 675 (D.P.R. 1988) (invalidating bill-of-lading clause requiring suit against Venezuelan carrier in Venezuela); *Mitsui & Co., Ltd.* v. *M/V Glory River*, 464 F. Supp. 1314 (W.D. Wash. 1978) (invalidating bill-of-lading clause requiring suit against Japanese carrier in Tokyo under Japanese law); *Northern Assurance Co., Ltd.* v. *M/V Caspian Career*, 1977 A.M.C. 421 (N.D. Cal. 1977) (invalidating bill-of-lading clause requiring suit against Japanese carrier in Tokyo under Japanese law); *M.G. Chem. Corp.* v. *M/V Sun Castor*, 1978 A.M.C. 1756 (D. Alaska 1977) (invalidating bill-of-lading clause requiring suit against Japanese carrier in Tokyo).

foreign court would apply [COGSA or the Hague Rules], requiring trial abroad *might* lessen the carrier's liability since there could be no assurance that it would apply them in the same way as would an American tribunal subject to the uniform control of the Supreme Court, and § 3(8) can well be read as covering a potential and not simply a demonstrable lessening of liability." 377 F.2d at 203-204 (emphasis in the original). Put squarely: "'It is entirely unrealistic to look to an obligation to sue overseas as not "lessening" the liability of the carrier.'" *Conklin & Garrett, Ltd.* v. *M/V Finnrose*, 826 F.2d 1441, 1444 (5th Cir. 1987) (quoting G. Gilmore & C. Black, *The Law of Admiralty*, 146 (1975)).[11]

For precisely those reasons, the Eleventh Circuit, in *State Establishment for Agricultural Product Trading* v. *M/V Wesermunde*, 838 F.2d 1576, *cert. denied*, 488 U.S. 916 (1988), held that Section 3(8) invalidates foreign *arbitration* clauses, just as it does foreign *forum selection* clauses. The plaintiff in that case brought an action in federal court arising from the loss of a cargo of eggs on board the M.V. Wesermunde in Tampa, Florida, for delivery to Aqaba, Jordan. Relying on the terms of the bill of lading, defendants moved to stay the litigation pending arbitration in London, England. The district court granted the motion, but the court of appeals reversed, holding that Section 3(8) of COGSA invalidated the foreign arbitration clause incorporated in the bill of lading.

The court of appeals explained that COGSA was "intended to reduce uncertainty concerning the responsibilities and liabilities of carriers, the responsibilities and rights of shippers, and the liabilities of underwriters who insure

[11] In *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972), this Court sustained a forum selection clause in a towage contract, but expressly noted that COGSA was "not applicable in this case." *Id.* at 10 n.11.

waterborne cargo." 838 F.2d at 1580. "By strictly circumscribing the ability of carriers to avoid liability on cargoes in their care, COGSA also greatly enhances the negotiability of bills of lading." *Ibid.* Toward that end, the court pointed out, COGSA "void[s] overreaching clauses inserted by carriers in their bills of lading that unreasonably limit the carrier's liability or obstructs the freight claimant's ability to secure redress." *Ibid.* For example, the court noted, foreign *forum selection* clauses have been uniformly rejected under COGSA "because such provisions, as a practical matter, tend to lessen the liability of the carrier, particularly where the claim is small." *Id.* at 1580-1581.

The court held that COGSA likewise invalidates foreign *arbitration* clauses in maritime bills of lading. To be sure, the court noted, arbitration as such does not violate COGSA, "in light of Congress' encouragement of arbitration by its enactment of the Arbitration Act, 9 U.S.C. §§ 1-14 (1970)." 838 F.2d at 1581. The court held, however, that "a provision requiring arbitration in a *foreign* country that has no connection with either the performance of the bill of lading contract or the making of the bill of lading contract is a provision that would conflict with COGSA's general purpose of not allowing carriers to lessen their risk of liability." *Ibid.*

Had the present case arisen in the Eleventh Circuit, the motion to stay the action pending arbitration in Japan would assuredly — as in *Wesermunde* — have been denied. Here, as in *Wesermunde*, neither the performance of the bill of lading, nor the making of the contract, took place in the foreign jurisdiction. The bill of lading was issued in Agadir by respondent's Moroccan agents to a Moroccan shipper and listed Bacchus as the consignee. The performance of the contract, involving a voyage from Northern Africa to the United States, as well as the contract of sale, involving goods sold by a Moroccan exporter to a New England fruit merchant, had nothing to do with Japan. Japan was simply the home of Nichiro, the vessel's liability insurers, and the

vessel's crew. Under Section 3(8), as construed by the Eleventh Circuit in *Wesermunde*, the foreign arbitration clause would be invalid.

The court below, however, expressly rejected *Wesermunde*, preferring to "join those courts upholding the validity of foreign arbitration clauses in bills of lading subject to COGSA." App., *infra*, 10a. Like the trial court — which chastised the Eleventh Circuit for acting "without proper regard for the Supreme Court's mandate that lower courts discard their historical distrust of arbitrators, and give effect to private dispute resolution tribunals" (*id.* at 18a) — the court of appeals cast its lot with the "numerous federal courts [that] have upheld foreign arbitration clauses in bills of lading subject to COGSA" (*id.* at 10a). As the district court recognized (*id.* at 28a), the question presented thus "involves a serious legal issue, on which courts have disagreed, which doubtless will arise in future cases."[12]

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[12] As the court of appeals acknowledged (App., *infra*, 9a-10a), the conflict between the First and Eleventh Circuits is symptomatic of a broader disagreement among the many district courts that have addressed the issue. Compare *Organes Enter., Inc.* v. *M/V Khalij Frost*, No. 88 Civ. 4710, 1989 WL 37660 (S.D.N.Y. April 12, 1989) (invalidating foreign arbitration clause); *Siderius, Inc.* v. *M.V. "Ida Prima"*, 613 F. Supp. 916 (S.D.N.Y. 1985) (same); *Pacific Lumber & Shipping Co., Inc.* v. *Star Shipping A/S*, 464 F. Supp. 1314 (W.D. Wash. 1979) (same) with *Citrus Marketing Bd. of Israel* v. *M/V Ecuadorian Reefer*, 754 F. Supp. 229 (D. Mass. 1990) ((enforcing foreign arbitration clause); *Nissho Iwai American Corp.* v. *M/V Sea Bridge*, No. Civ.A.R-90-1238, 1991 WL 182117, at *7 (D. Md. April 25, 1991) (same); *Travelers Indem. Co.* v. *M/V Mediterranean Star*, No. 86 Civ. 8797, 1988 WL 78363 (S.D.N.Y. July 19, 1988) (same); *Mid South Feeds, Inc.* v. *M/V Aqua Marine*, 1988 A.M.C. 437, 439-440 (S.D. Ga. 1986) (same); *Kaystone Chemical, Inc.* v. *Bow-Sun*, No. 88 Civ. 5859, 1989 WL 39498, at *4 (S.D.N.Y. April 19, 1989) (same) (citing

The result is a patchwork of conflicting decisions, in both the circuit and district courts — some upholding, some rejecting, foreign arbitration clauses. While such a lack of uniformity may be tolerable in some industries, it poses substantial difficulties for maritime commerce. The typical maritime transaction subject to COGSA — "to or from ports of the United States" (46 U.S.C. 1300) — involves many different domestic jurisdictions, any one of which could become the forum for a lawsuit. The present case illustrates the point: Bacchus is a New York partnership, with distribution points throughout New England, and which took possession of the goods in Massachusetts. Here, as in most COGSA cases, there may be a range of possible venues, each with its own approach to foreign arbitration clauses in bills of lading.

Maritime businesses should not have to speculate at their peril whether the selected forum will (like the Eleventh Circuit) enforce Section 3(8) — or, instead, like the court below, conclude that the FAA "removes" such provisions "from the grasp of COGSA" (App., *infra*, 10a).[13] Rather, as this Court explained in *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 402 (1970), "federal admiralty law should be 'a system of law coextensive with, and operating

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cases); *Fakiah Poultry Farms* v. *M/V Mulhiem*, No. 85 Civ. 2657 (WCC), 1986 WL 12534 (S.D.N.Y. Oct. 24, 1986) (same); *Mitsubishi Shoji Kaisha Ltd.* v. *MS Galini*, 323 F. Supp. 79, 82-84 (S.D. Tex. 1971) (same). Although the issue has, to date, provoked only two (conflicting) court of appeals decisions, that is doubtless because, pursuant to 9 U.S.C. 16(b)(1), an order granting a stay pending arbitration is not subject to interlocutory review except (as in this case) upon certification under 28 U.S.C. 1292(b).

[13] Nor, for that matter, should businesses be permitted to obtain the benefit of a more favorable rule of law simply by engaging in strategic "forum shopping."

uniformly in, the whole country.'" Indeed, it was the very purpose of COGSA to take the guesswork out of bills of lading, on the premise that promoting "[t]he uniformity and simplification of bills of lading [would] be of immense value to shippers who will be relieved of the necessity of closely examining all bills of lading to determine the exceptions contained therein to ascertain their rights and responsibilities." *Uniform Ocean Bills of Lading — Hague Rules*, H.R. Rep. No. 2218, 74th Cong., 2d Sess. 7 (1936). The conflict between the First and Eleventh Circuits frustrates that congressional purpose. Further review is warranted.

B. The Decision Below Is Wrong

The decision of the court of appeals is flawed in three fundamental respects. First, the court created an indefensible dichotomy between foreign *forum selection* clauses (which the court conceded are invalid under COGSA) and foreign *arbitration* clauses (which the court upheld), insisting on a distinction without a difference. Second and relatedly, by sustaining foreign arbitration clauses the court effectively gutted the basic protections afforded by COGSA. Finally, the court of appeals' rationale for its decision — that COGSA and the FAA are irreconcilably in "conflict" (App., *infra*, 11a), and that "canons of statutory interpretation" are therefore required to select a winner — is entirely mistaken.

1. As noted above (*supra* page 10), the court of appeals itself conceded (App., *infra*, 6a (emphasis added)) that "§ 3(8) has been consistently used by federal courts to invalidate *forum selection* clauses in bills of lading governed by COGSA." The rationale is plain: "'It is entirely unrealistic to look to an obligation to sue overseas as not "lessening" the liability of the carrier.'" *Conklin & Garrett, Ltd.* v. *M/V Finnrose*, 826 F.2d 1441, 1444 (5th Cir. 1987) (quoting G. Gilmore & C. Black, *The Law of Admiralty*, 146 (1975)). By compelling a buyer, like petitioner, to litigate its rights in a foreign courthouse, typically under foreign law, and

invariably as a result of a unilaterally-imposed term, a forum selection clause imposes substantial, often overwhelming, obstacles to the enforcement of COGSA rights.

Foreign arbitration clauses have the same effect: they, too, require resort to an overseas forum, typically governed by foreign law.[14] As one commentator has asked rhetorically: "If [a] court will not validate a choice of forum clause that requires suit abroad, why should an arbitration clause requiring the same thing be any different?" Note, *Arbitration Clauses*, 21 Colum. J. Transnat'l L. at 168. And even were COGSA rules applicable in the foreign arbitration, "there could be no assurance that [the foreign arbitrator] would apply them in the same way as would an American tribunal subject to the uniform control of the Supreme Court * * *." *Indussa Corp.* v. *S.S. Ranborg*, 377 F.2d 200, 203-204 (2d Cir. 1967) (en banc).

But while COGSA principles should logically invalidate *both* foreign forum selection and foreign arbitration clauses, the court of appeals has effectively created a distinction between the two. By its lights, if a carrier imposes a foreign *litigation* requirement, COGSA will govern and invalidate the clause. But should the carrier impose foreign *arbitration*, the result (in the First Circuit) will be just the opposite. Section

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[14] In the present case, for example, the arbitration proceedings in Japan would be governed not by COGSA but by the Japanese Hague Rules, according to respondent's own expert. See C.A. App. A41-A42 (affidavit of Seiichi Nakamura). That would have severe consequences for petitioner: unlike COGSA, which by judicial construction imposes on the carrier a *non-delegable* obligation to load and stow the cargo properly (46 U.S.C. 1303(2)), the comparable provision in the Japanese Hague Rules purports to impose the duty to load and stow only on the carrier and its employees — and thus would appear not to cover this case, in which the stevedores who loaded and stowed the boxes of oranges in Morocco were hired by Galaxie, the shipper.

3(8) makes no such distinction on its face, nor does any such distinction make sense.

2. What is more, by preempting COGSA — by holding that the FAA "removes" foreign arbitration clauses "from the grasp of COGSA" (App., *infra*, 10a) — the court of appeals has undermined the purposes of the statute. COGSA "was intended to reduce uncertainty concerning the responsibilities and liabilities of carriers, the responsibilities and rights of shippers and the liabilities of underwriters who insure waterborne cargo." *Union Ins. Soc. of Canton, Ltd.* v. *S.S. Elikon*, 642 F.2d 721, 723 (4th Cir. 1981). "By strictly circumscribing the ability of carriers to avoid liability on cargoes in their care, COGSA also greatly enhances the negotiability of bills of lading." *Ibid.* And while "'COGSA allows a freedom of contracting out of its terms,'" it does so "'only in the direction of *increasing* the shipowner's liability, and never in the direction of diminishing them. This apparent onesidedness is a commonsense recognition of the inequality in bargaining power which * * * COGSA [was] designed to redress * * *.'" *Conklin & Garrett, Ltd.* v. *M/V Finnrose*, 826 F.2d 1441, 1443-1444 (5th Cir. 1987) (quoting G. Gilmore & C. Black, *The Law of Admiralty* 146 (1975)).

The court of appeals' decision cannot be squared with these fundamental purposes. Following the court's lead, a carrier could oust an American court from the jurisdiction conferred by COGSA simply by providing, in the bill of lading, for *arbitration*, not *litigation*, overseas. And for carriers, that result is easily accomplished — since a bill of lading is not an arms-length agreement, but rather is imposed, unilaterally, by the carrier. With a single stroke of fine print, the carrier could — and, in light of the decision below, inevitably will — deprive purchasers of their COGSA rights.[15]

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[15] In this critical respect, foreign arbitration clauses in bills of lading differ from the forum selection clauses that the Court upheld in *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972), and *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585 (1991). In *Bremen*, the Court found "strong evidence that the forum clause was a vital part of the agreement" between the parties, and that "it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations." 407 U.S. at 14. Moreover, although the ticket purchasers in *Carnival Cruise* did not negotiate the terms of the forum selection clause (see 499 U.S. at 593), they nevertheless "were given notice of the forum provision and, therefore, presumably retained the option of rejecting the contract with impunity" (*id.* at 595). Here, by contrast, petitioner learned of the foreign arbitration clause only when the bill of lading was presented by the shipper. See C.A. App. A39. By that point, the goods were already en route to New Bedford.

There is no basis for that result. Foreign arbitration, no less than foreign litigation, "puts a high hurdle in the way of enforcing" the shipper's rights. G. Gilmore & C. Black, *The Law of Admiralty*, 146 (1975). And as the leading treatise explains, COGSA "makes it plain that *no* provisions directly or indirectly disadvantaging the shipper were to be permitted." *Ibid.* (emphasis added).

Not only does the decision below gut the pro-shipper "onesidedness" intended by COGSA (*Conklin & Garrett, Ltd.*, 826 F.2d at 1444); it also introduces significant "uncertainty concerning the responsibilities and liabilities of carriers, the responsibilities and rights of shippers and the liabilities of underwriters who insure waterborne cargo" (*Union Ins. Soc. of Canton, Ltd.*, 642 F.2d at 723). Under the court of appeals' decision, the rights and liabilities of the parties would depend entirely upon the rules and procedures of the foreign jurisdiction. That is precisely what Congress sought to avoid by enacting COGSA.

3. Even the court of appeals seemed to appreciate these difficulties with its analysis. As it grudgingly conceded, "absent the FAA, COGSA might operate to nullify foreign arbitration clauses in bills of lading." App., *infra*, 10a n.5. It concluded, however, that COGSA and the FAA are in "conflict" and that "canons of statutory interpretation" were therefore required to decide between them. App., *infra*, 11a.

That was mistaken. "The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974). Accord *County of Yakima* v. *Confederated Tribes and Bands of the Yakima Indian Nation*, 112 S. Ct. 683, 692 (1992). Courts must therefore "read federal statutes 'to give effect to each if [they] can do so while preserving their sense and purpose.'" *Pittsburgh & Lake Erie R. Co.* v. *Railway Labor Executives' Ass'n*, 491 U.S. 490, 510 (1989). The "cardinal principle," this Court has explained, is "to give effect to both [statutes] if possible." *United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939).

Section 2 of the FAA is easily reconcilable with Section 3(8) of COGSA. By its terms, Section 2 provides for the enforceability of arbitration clauses "save upon such grounds as exist at law or in equity for the revocation of any contract." One such "ground" is when the contract violates some other statute (such as COGSA): "The general rule of law is that a contract made in violation of a statute is void." *Miller* v. *Ammon*, 145 U.S. 421, 426 (1892). As this Court explained fully 100 years ago, "it has never been doubted that, as a general rule, a contract made in contravention of a statute is void and cannot be enforced." *Burck* v. *Taylor*, 152 U.S. 634, 649 (1894). Accord *Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540, 548 (1902).

As even the court of appeals seemed to recognize (App., *infra*, 10a n.5), COGSA — at least "absent the FAA" — would invalidate the foreign arbitration clause in this case. It follows that, under the "saving" provision of Section 2 of the FAA, the foreign arbitration clause is *not* enforceable. In short, COGSA and the FAA "are capable of co-existence," and it was therefore "the duty" of the court below "to regard each as effective." *Morton*, 417 U.S. at 551.

The court failed to discharge that duty. Instead, it played one statute off against the other, invoking principles of statutory construction designed to select among "conflicting" statutes. It should not have done so.[16]

C. The Question Presented Is One Of Recurring Importance To The Maritime Industry

The bill of lading is a centerpiece of international commerce. Goods of all sorts are bought and sold the world over on the basis of negotiable bills of lading and other commercial documents. Sellers typically satisfy their obligations to their buyers by tendering to the buyer (or its bank) an endorsed bill of lading attesting that the goods are en

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[16] Even at the task it undertook, the court of appeals erred. To begin with, we do not agree that Section 2 of the FAA is a "more specific statute" than Section 3(8) of COGSA. App., *infra*, 12a. *Both* statutes deal expressly with maritime contracts, and COGSA deals more particularly with contracts for the carriage of goods — precisely the kind of contract at issue in this case. Moreover, the reenactment of the FAA eleven years after the enactment of COGSA is not necessarily illuminating, in light of the "cardinal principle of construction that repeals by implication are not favored" (*United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939)). The point is mooted in any event by the fact that Section 2 of the FAA carves out an explicit exception for "such grounds as exist at law or in equity for the revocation of any contract" — which, in this case, includes the violation of Section 3(8) of COGSA.

route. The bill of lading thereby evidences both the buyer's ownership of the goods and its contract with the carrier if the goods are lost or damaged.

The fundamental premise of COGSA is that bills of lading should be easily, and predictably, enforceable. See *Union Ins. Soc. of Canton, Ltd.* v. *S.S. Elikon*, 642 F.2d 721, 723-725 (4th Cir. 1981). Central to such enforceability is the availability of a convenient forum in which controlling law will be recognized and applied. By governing *all* contracts of carriage for goods touching United States ports, COGSA enables businessmen engaged in the foreign commerce of the United States to buy and sell goods confident that their COGSA rights will not be infringed by bill-of-lading terms that lessen those rights — including terms that require foreign arbitration, typically (as here) under foreign law.

The opinion of the court of appeals frustrates those statutory purposes. It encourages carriers to impose arbitration terms that strip American courts of jurisdiction, in favor of foreign jurisdictions that bear little, if any, connection to the underlying transaction (as is the case here). It forces cargo owners — faced with unilaterally-imposed, boilerplate provisions — to submit to foreign arbitrations they never agreed to, in countries where it will be costly and difficult, if not impossible, for them to assert their claims effectively. It practically forecloses the assertion of small claims in foreign proceedings where costs would be disproportionate to the amount in dispute.[17] Indeed, even large claims may be abandoned; and cargo premiums will

[17] Accord Black, *The Bremen, COGSA and the Problem of Conflicting Interpretation*, 6 Vand. J. Transnat'l L. 365, 369 (1973) ("On most moderate-sized claims, remission to the foreign forum is a practical immunization of the carrier from liability").

doubtless increase, as the right of subrogation (for insurance companies like petitioner) will be materially diluted.

And the problem is only getting worse. As the district court recognized (App., *infra*, 28a), the question presented is one "on which courts have disagreed, which doubtless will arise in furture cases." Indeed, the reported cases alone suggest that foreign law-and-arbitration clauses have been appearing in ocean bills of lading with increasing frequency.[18] The decision below is likely to embolden carriers still further: having lost — and lost *uniformly* — the battle to impose foreign forum selection clauses, carriers will accomplish much the same end through the simple device of foreign arbitration clauses. The legitimate business expectations of more and more cargo owners concerning their bill-of-lading rights will be frustrated by unforeseen, costly

[18] For decisions invalidating foreign arbitration clauses, *see State Establishment for Agric. Prod. Trading* v. *M/V Wesermunde*, 838 F.2d 1576 (11th Cir. 1988), *cert. denied*, 488 U.S. 916 (1988); *Organes Enter., Inc.* v. *M/V Khalij Frost*, No. 88 Civ. 4710, 1989 WL 37660 (S.D.N.Y. April 12, 1989); *Siderius, Inc.* v. *M/V Ida Prima*, 613 F. Supp 916 (S.D.N.Y. 1985); *Pacific Lumber & Shipping Co., Inc.* v. *Star Shipping A/S*, 464 F. Supp. 1314 (W.D. Wash. 1979). For decisions enforcing foreign arbitration clauses, see *Citrus Marketing Bd. of Israel* v. *M/V Ecuadorian Reefer*, 754 F. Supp. 229 (D. Mass. 1990); *Nissho Iwai American Corp.* v. *M/V Sea Bridge*, No. Civ. A. R-90-1238, 1991 WL 182117, at 7 (D. Md. April 25, 1991); *Mid South Feeds, Inc.* v. *M/V Aqua Marine*, 1988 A.M.C. 437, 439-440 (S.D. Ga. 1986); *Kaystone Chemical, Inc.* v. *Bow-Sun*, No. 88 Civ. 5859, 1989 WL 39498, at *4 (S.D.N.Y. April 19, 1989) (citing cases); *Travelers Indem. Co.* v. *M/V Mediterranean Star*, No. 86 Civ. 8797, 1988 WL 78363 (S.D.N.Y. July 19, 1988); *Fakiah Poultry Farms* v. *M/V Mulhiem*, No. 85 Civ. 2657 (WCC), 1986 WL 12534 (S.D.N.Y. Oct. 24, 1986); *Mitsubishi Shoji Kaisha Ltd.* v. *MS Galini*, 323 F. Supp. 79, 82-84 (S.D. Tex. 1971).

arbitrations in vexatious foreign forums. In time, the bill of lading will cease to be the uniform and simple contract of carriage envisioned by Congress.

The Eleventh Circuit got it right in *Wesermunde*: "[A] provision requiring arbitration in a *foreign* country that has no connection with either the performance of the bill of lading contract or the making of the bill of lading contract is a provision that would conflict with COGSA's general purpose of not allowing carriers to lessen their risk of liability." 838 F.2d at 1581. Because the First Circuit has unjustifiably rejected that basic COGSA principle, the petition should be granted and the decision of the court of appeals reversed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1994

APPENDICES

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 93-2179

VIMAR SEGUROS Y REASEGUROS, S.A.,

PLAINTIFFS, APPELLANTS,

v.

M/V SKY REEFER, HER ENGINES, ETC.,
AND M.H. MARITIMA, S.A.,

DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Mark L. Wolf, *U.S. District Judge]*

Before
Breyer*, *Chief Judge*,
Bownes, *Senior Circuit Judge*,
and Stahl, *Circuit Judge*.

July 7, 1994

*Chief Judge Stephen Breyer heard oral argument in this matter but did not participate in the drafting or the issuance of the panel's opinion. The remaining two panelists therefore issue this opinion pursuant to 28 U.S.C. § 46(d).

BOWNES, *Senior Circuit Judge*. This appeal asks us to decide whether a foreign arbitration clause in a maritime bill of lading governed by the Carriage of Goods at Sea Act, 46

U.S.C. § 1300 *et seq.* (COGSA), is invalid under that statute, or whether such a clause is enforceable under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (FAA). We conclude that the FAA controls, and that the arbitration clause is valid. Accordingly, the order of the district court staying this action pending arbitration in Tokyo is affirmed.

I.

BACKGROUND

Plaintiff-appellant Bacchus Associates is a wholesale fruit distributor in the Northeast United States. Bacchus was the owner of a shipment of oranges travelling from Agadir, Morocco to New Bedford, Massachusetts, in February 1991 aboard the SKY REEFER,[1] a vessel owned by M.H. Maritima, S.A. Maritima had time-chartered the vessel to Honma Senpaku Co., Ltd., who in turn time-chartered it to Nichiro Corp. Bacchus entered into a voyage charter with Nichiro for the February 1991 voyage.

The oranges were shipped under a bill of lading issued in Morocco by Nichiro. The bill of lading constitutes the contract of carriage between Bacchus and Maritima. En route to New Bedford, numerous boxes of oranges were crushed. Bacchus filed an action in the United States District Court for the District of Massachusetts, *in rem* against the SKY REEFER, and *in personam* against Maritima, seeking to recover approximately $1 million in damages.

Maritima moved to stay the action and compel arbitration in Tokyo pursuant to a clause in the bill of lading:

[1] The subrogated underwriter of the oranges, Vimar Seguros Y Reaseguros, is also a plaintiff-appellant in this action. Hereafter, references to Bacchus include Vimar where applicable.

Governing Law and Arbitration

(1) The contract evidenced by or contained in this Bill of Lading shall be governed by Japanese Law.

(2) Any dispute arising from this Bill of Lading shall be referred to arbitration in Tokyo by the Tokyo Maritime Arbitration Commission (TOMAC) at the Japan Shipping Exchange, Inc., in accordance with the Rules of TOMAC and any agreement thereto, and the award given by the arbitrators shall be final and binding on both parties.

The district court held that the arbitration clause contained in subsection (2) was enforceable, granted Maritima's motion for a stay pending arbitration, and certified the following question for interlocutory appeal pursuant to 28 U.S.C. 1292(b) "[W]hether 46 U.S.C. § 1303(8) [§ 3(8) of COGSA] nullifies an arbitration clause contained in a bill of lading governed by COGSA." With this question in mind, we begin our journey through unsettled statutory waters.

II.

DISCUSSION

COGSA was passed in 1936 as the American enactment of the Hague Rules, and was part of an international effort to achieve uniformity and simplicity in bills of lading used in foreign trade. *Union Ins. Soc'y of Canton, Ltd.* v. *S.S. Elikon*, 642 F.2d 721, 723 (4th Cir. 1981). COGSA was also intended to reduce uncertainty concerning the responsibilities and liabilities of carriers, responsibilities and rights of shippers, and liabilities of insurers. *State Establishment for Agric. Prod. Trading* v. *M/V Wesermunde*, 838 F.2d 1576, 1580 (11th Cir.), *cert. denied*, 488 U.S. 916 (1988) ("*Wesermunde*"); *S.S. Elikon*, 642 F.2d at 723; *see generally* Grant Gilmore & Charles L. Black, *The Law of Admiralty* § 3-25 at 145 (2d ed. 1975).

COGSA applies to "[e]very bill of lading . . . which is evidence of a contract for the carriage of goods by sea to or from parts of the United States, in foreign trade . . . ." 46 U.S.C. § 1300. The parties agree that the bill of lading at issue here is covered by COGSA *ex proprio vigore*, in other words, as a matter of law. The bill of lading also contains the following provision:

> **Local Law**
>
> In case this Bill of Lading covers the Goods moving to or from the U.S.A. and it shall be adjudged that the Japanese Law does not govern this Bill of Lading, then the provisions of the U.S. Carriage of Goods at Sea Act 1936 shall govern before the Goods are loaded on and after they are discharged from the vessel and throughout the entire time during which the Goods are in the actual custody of the carrier.

Bacchus argues that the Tokyo arbitration clause is invalid under § 3(8) of COGSA which prohibits the "lessening" of the carrier's obligation as imposed by COGSA's other sections.[2]

In *Indussa Corp.* v. *S.S. Ranborg*, 377 F.2d 200 (2d Cir. 1967) (en banc), the Second Circuit held that all foreign forum selection clauses in bills of lading governed by

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[2] This provision provides as follows:

> Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties or obligations provided in this section, or lessening such liability otherwise than as provided in this Act, shall be null and void and of no effect.

46 U.S.C. § 1303(8)

COGSA are necessarily invalid under § 3(8) because they tend to lessen the carrier's liability. *Id.* at 204. The court reasoned as follows:

> From a practical standpoint, to require an American plaintiff to assert his claim only in a distant court lessens the liability of the carrier quite substantially, particularly when the claim is small. Such a clause puts "a high hurdle" in the way of enforcing liability, and thus is an effective means for carriers to secure settlements lower than if cargo [sic] could sue in a convenient forum.

Id. at 203.[3] Moreover, "[a] clause making a claim triable only in a foreign court would almost certainly lessen liability if the law which the court would apply was not [COGSA]." *Id.* Furthermore,

> [e]ven when the foreign court would apply [COGSA], requiring trial abroad *might* lessen the carrier's liability since there could be no assurance that it would apply [COGSA] in the same way as would an American tribunal subject to the uniform control of the Supreme Court . . . . We think that Congress meant to invalidate any contractual

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[3] The court also concluded that COGSA, wherever it governs a bill of lading, requires application of American law. *Indussa*, 377 F.2d at 203; *see generally* Thomas J. Schoenbaum, *Admiralty & Maritime Law* § 9-18 at 326-27 (Pra. ed. 1987). Bacchus contends that the Japanese choice-of-law clause in its bill of lading, in addition to the arbitration clause, is null and void under § 3(8) of COGSA, and, alternatively, that the "Local Law" clause in the bill of lading requires that COGSA, and not Japanese law, governs, because COGSA applies *ex proprio vigore*. Although both of these arguments appear to be substantial, only the validity of the arbitration clause is at issue on this interlocutory appeal. In light of our holding, the choice-of-law question must be decided, in the first instance, by an arbitrator.

> provision in a bill of lading for a shipment to or from the United States that would prevent cargo [sic] able to obtain jurisdiction over a carrier in an American court from having that court entertain the suit and apply the substantive rules Congress had prescribed.

Id. at 203-04 (emphasis in original) (citations omitted) (footnote omitted).

Since *Indussa*, § 3(8) has been consistently used by federal courts to invalidate forum selection clauses in bills of lading governed by COGSA. *See, e.g., Conklin & Garrett, Ltd.* v. *M/V Finnrose*, 826 F.2d 1441, 1442-44 (5th Cir. 1987) (forum selection clause designating Finland invalid even where bill of lading provided for application of COGSA in Finland); *Union Soc'y of Canton, Ltd.*, 642 F.2d at 723-25 (choice of forum clause requiring litigation in Germany invalid under § 3(8)); *cf. Fireman's Fund Amer. Ins. Cos.* v. *Puerto Rican Forwarding Co.*, 492 F.2d 1294 (1st Cir. 1974) (distinguishing *Indussa* and upholding New York City forum selection clause). *Indussa* has also been approved by commentators. *See* Gilmore & Black, supra § 3-25 at 145-46 n.23; Schoenbaum, supra § 9-18 at 327; Charles L. Black, *The Bremen, COGSA and the Problem of Conflicting Interpretation*, 6 Vand. J. Trans. L. 365, 368-69 (1973). *But see* Note, Kenneth M. Klemm, *Forum Selection in Maritime Bills of Lading Under COGSA*, 12 Fordham Int'l L.J. 459 (1989); Stephen M. Denning, *Choice of Forum Clauses in Bills of Lading*, 2 J. Mar. L. & Com. 17 (Oct. 1970).

While we need not fully explore the issue, we note that the Supreme Court's recent decision in *Carnival Cruise Lines*, Inc. v. *Shute*, 499 U.S. 585 (1991), in which the Court held that the Limitation of Vessel Owners' Liability Act did not invalidate forum selection agreements, casts some doubt upon *Indussa's* continuing viability. *See Fabrica De Tejidos La Bellota S.A.* v. *M/V Mar*, 799 F. Supp. 546, 560-61 (D.

Virgin Islands 1992); *see also* Patrick J. Borchers, *Forum Selection Agreements in the Federal Courts After Carnival Cruise: A Proposal for Congressional Reform*, 67 Wash. L. Rev. 55, 77 (1992) (*Carnival Cruise* implicitly overruled *Indussa* and its progeny). *But see Underwriters at Lloyd's of London* v. *M/V Steir*, 773 F. Supp. 523, 526-27 (D.P.R. 1991) (invalidating forum selection clause under § 3(8) of COGSA, holding that *Indussa* survives *Carnival Cruise*).

Moveover, in *Fireman's Fund* we questioned whether *Indussa* even survived the Supreme Court's decision in *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972). In *The Bremen*, the Supreme Court enforced a foreign forum selection clause in a maritime contract not covered by COGSA. In doing so, the Court focused on whether the clause was unreasonable'' under the circumstances. *The Bremen*, 407 U.S. at 10. We remarked as follows:

> Although the Supreme Court has acknowledged the *Indussa* decision and has not formally rejected it, *see The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 10 n.11, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972), several passages in the Bremen opinion cast some doubt on the underlying rationale of *Indussa*. *See, e.g.*, 407 U.S. at 9, 92 S.Ct. at 1912 ("The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts.")

Fireman's Fund, 492 F.2d at 1296 n.2. Because *The Bremen* is not a COGSA case, however, it is easily distinguishable from *Indussa* and its progeny. *See S.S. Elikon*, 642 F.2d at 724-25 (holding that *The Bremen* did not involve COGSA and therefore did not disturb *Indussa*).

Notwithstanding the arguably tremulous ground on which *Indussa* and its progeny currently sit, we will assume,

arguendo, that, for the reasons set forth in *Indussa*, foreign forum selection clauses are invalid under § 3(8) of COGSA.

The other statute implicated in this case is the FAA. Section 2 of that act provides:

> A written provision in any maritime transaction . . . to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. "[B]ills of lading of water carriers" are explicitly included as "maritime transactions" under the statute. 9 U.S.C. § 1. Furthermore, the FAA requires a federal district court, on the application of one of the parties, to stay litigation and grant an order compelling arbitration of any issue referable to arbitration under the agreement. *Id.* §§ 3, 4.

Where there is an agreement to arbitrate, the FAA reflects a strong, well-established, and widely recognized federal policy in favor of arbitration. *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220, 226 (1987); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985); *Securities Indus. Ass'n* v. *Connolly*, 883 F.2d 1114,1118-19 (1st Cir. 1989), *cert. denied*, 495 U.S. 956 (1990). Arbitration agreements are unenforceable under § 2 of the FAA only where the agreement would be revocable under state contract law. *Southland Corp.* v. *Keating*, 465 U.S. 1, 11 (1984) (party may assert general contract defenses, such as fraud and duress, to avoid enforcement of arbitration agreement); *McAllister Bros., Inc.* v. *A & S Transp. Corp.*, 621 F.2d 519, 524 (2d Cir. 1980) (same).[4]

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[4] Bacchus argued below that the bill of lading was a contract of adhesion, and that the arbitration clause was therefore unenforceable. This defense was rejected by the district court, and that ruling is not before us on the present appeal. We recognize, however, that maritime bills of lading have been viewed as contracts of adhesion. *See, e.g., Organes Enters., Inc.* v. *M/V Khalij Frost*, 1989 A.M.C. 1460, 1465-66 (S.D.N.Y. 1989); *Pacific Lumber & Shipping Co.* v. *Star Shipping A/S*, 464 F. Supp. 1314, 1315 (W.D. Wash. 1979). Accordingly, if the adhesion issue had been a subject of this interlocutory appeal, it would warrant close scrutiny.

Although this court has never decided whether a foreign arbitration clause in a bill of lading governed by COGSA is invalid under § 3(8) of that statute, courts that have reached the question are divided. A handful of courts, including the Eleventh Circuit, have employed the reasoning articulated in *Indussa* to invalidate foreign arbitration clauses. *See, e.g., Wesermunde*, 838 F.2d at 1580-82; *M/V Khalij Frost*, 1989 A.M.C. at 1462-66; *Siderius* v. *M.V. Ida Prima*, 613 F. Supp. 916, 920-21 (S.D.N.Y. 1985); *Star Shipping A/S*, 464 F. Supp. at 1314-15; *see also* Gilmore & Black, *supra*, § 3-25 at 146 n.23; Schoenbaum, *supra* § 9-19 at 329.

In *Wesermunde*, the Eleventh Circuit declined to enforce a foreign arbitration agreement contained in a bill of lading governed by COGSA. Relying on *Indussa*, the court explained as follows:

> While we do not believe that arbitration in and of itself is *per se* violative of COGSA's provisions, especially in light of Congress' encouragement of arbitration by its enactment of the Arbitration Act, 9 U.S.C. §§ 1-14 (1970) the court does believe that a provision requiring arbitration in a *foreign* country that has no connection with either the performance of the bill of lading contract or the making of the bill of lading contract is a provision that would conflict

> with COGSA's general purpose of not allowing carriers to lessen their risk of liability.

Wesermunde, 838 F.2d at 1581 (footnote omitted). Some courts have gone one step further, holding that foreign arbitration clauses in bills of lading are *per se* invalid under COGSA because "[t]he considerations [stated in *Indussa*] are substantially similar where the bill of lading requires the consignee to arbitrate in a foreign country." *Siderius*, 613 F. Supp. at 920; *accord Khalij Frost*, 1989 A.M.C. at 1462 (*Indussa* rationale "appl[ies] with equal force in the case of a foreign arbitration clause in a bill of lading").

On the other side of the coin, numerous federal courts have upheld foreign arbitration clauses in bills of lading subject to COGSA. *See, e.g., Nissho Iwai Amer. Corp.* v. *M/V Sea Bridge*, 1991 A.M.C. 2070 (D. Md. 1991); *Citrus Mktg. Bd.* v. *M/V Ecuadorian Reefer*, 754 F. Supp. 229 (D. Mass. 1990); *Travelers Indem., Co.* v. *M/V Mediterranean Star*, 1988 A.M.C. 2483 (S.D.N.Y. 1988); *Mid South Feeds, Inc.* v. *M/V Aqua Marine*, 1988 A.M.C. 437 (S.D. Ga. 1986); *Midland Tar Distillers, Inc.* v. *MIT Lotos*, 362 F. Supp. 1311, 1315 (S.D.N.Y. 1973); *Mitsubishi Shoji Kaisha Ltd.* v. *MS Galini*, 323 F. Supp. 79, 83-84 (S.D. Tex. 1971); *Kurt Orban Co.* v. *S/S Clymenia*, 318 F. Supp. 1387, 1390 (S.D.N.Y. 1970).

We join those courts upholding the validity of foreign arbitration clauses in bills of lading subject to COGSA. In reaching this result, we are guided by our belief that the FAA alone governs the validity of arbitration clauses, both foreign and domestic, and consequently removes them from the grasp of COGSA.[5]

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[5] We recognize, however, that absent the FAA, COGSA might operate to nullify foreign arbitration clauses in bills of lading.

We begin with two canons of statutory interpretation. First, a later enacted statute generally limits the scope of an earlier statute if the two laws conflict. *Davis* v. *United States*, 716 F.2d 418, 428 (7th Cir. 1983); *Tennessee Gas Pipeline Co.* v. *Federal Energy Regulatory Comm'n*, 626 F.2d 1020, 1022 (D.C. Cir. 1980); *Indussa*, 377 F.2d at 204 n.4;[6] *see generally* 2B Norman J. Singer, *Sutherland*

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[6] Footnote four of *Indussa* states:

> Our ruling does not touch the question of arbitration clauses in bills of lading which require this to be held abroad. The validity of such a clause in a charter party, or in a bill of lading effectively incorporating such a clause in a charter party, have been frequently sustained. Although the Federal Arbitration Act adopted in 1925 validated a written arbitration provision "in any maritime transaction," § 2, and defined that phrase to include "bills of lading of water carriers," § 1. COGSA, enacted in 1936, made no reference to that form of procedure. *If there be any inconsistency between the two acts, presumably the Arbitration Act would prevail by virtue of its reenactment as positive law in 1947.*

Indussa, 377 F.2d at 204 n.4 (citations omitted) (emphasis added). Although a later Second Circuit opinion sought to narrow the scope of this dictum, *see Aaacon Auto Transp. Co.* v. *State Farm Mut. Auto Ins. Co.*, 537 F.2d 648, 655 (2d Cir. 1976) (explaining that footnote four of *Indussa* was concerned "primarily . . . upon those commercial situations in which the economic strength and bargaining power of the parties is roughly equal"), courts have continued to rely on footnote four in enforcing foreign arbitration clauses in bills of lading governed by COGSA. *See Fakieh Poultry Farms* v. *M/V Mulheim*, No. 85 Civ. 26577, slip op. at 2 (S.D.N.Y. Oct. 24, 1986); *M/V Mediterranean Star*, 1988 A.M.C. at 2484-85; *see also Kaystone Chem., Inc.* v. *Bow-Sun*, 1989 A.M.C. 2976, 2981-82 (S.D.N.Y. 1989) (stating that *Indussa* footnote "probably" requires enforcement of foreign arbitration clause in COGSA bill of lading). *But see Siderius*, 613 F. Supp.

Statutory Construction § 51.03 at 141 (5th ed. 1992). Second, where two statutes conflict, regardless of the priority of enactment, the specific statute ordinarily controls the general. *See Watson* v. *Fraternal Order of Eagles*, 915 F.2d 235, 240 (6th Cir. 1990); *see generally* 2B *Sutherland Statutory Construction*, § 51.05 at 174.

With respect to the former canon, the FAA must be given priority over COGSA in light of the FAA's reenactment in 1947, eleven years after COGSA was passed. Similarly, the latter canon suggests that the FAA be given effect. Section 3(8) of COGSA, which voids any clause in a bill of lading that "lessens" the carrier's liability, makes no reference to arbitration, or for that matter, forum selection clauses.[7] Conversely, the FAA specifically validates arbitration clauses contained in maritime bills of lading. *See* 9 U.S.C. §§ 1, 2.

Next, and perhaps of paramount importance, we believe that the strong federal policy favoring arbitration supports the primacy of the FAA over COGSA where arbitration agreements are concerned. *See Ecuadorian Reefer*, 754 F. Supp. at 233-34. The existence of this policy distinguishes the present case from foreign choice-of-forum cases because in those cases "there was no compelling congressional mandate

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at 920-21 (holding *Aaacon* substantially undercuts scope of the *Indussa* footnote); *Khalij Frost*, 1989 A.M.C. at 1463-64 (same). While we agree with the rule of statutory construction expressed in the footnote, we take no position on the effect of *Aaacon* on that note.

[7] In fact, up until *Indussa*, the Second Circuit regularly enforced foreign forum selection clauses in bills of lading governed by COGSA. *See, e.g., William H. Muller & Co.* v. *Swedish Amer. Line Ltd.*, 224 F.2d 806 (2d Cir.), *cert. denied*, 350 U.S. 903 (1955); *Cerro de Pasco Copper Corp.* v. *Knut Knutsen, O.A.S.*, 187 F.2d 990 (2d Cir. 1951).

in favor of giving effect to agreements to litigate before foreign tribunals." *MS Galini*, 323 F. Supp. at 83.

Furthermore, American courts' mistrust of foreign courts, a driving force in the *Indussa* court's decision to invalidate foreign choice-of-forum clauses, is an inappropriate consideration in the context of arbitration. *See Mitsubishi Motors*, 473 U.S. at 626-27 (We are "well past the time when judicial suspicion of . . . arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."); *Connolly*, 883 F.2d at 1119 ("[C]ourts must be on guard for artifices in which the ancient suspicion of arbitration might reappear."). Finally, unlike a foreign forum selection clause, an agreement to arbitrate does not deprive a federal court of its jurisdiction over the underlying dispute. *S/S Clymenia*, 318 F. Supp. at 1390; *MS Galini*, 323 F. Supp. at 83.

For the foregoing reasons, the order of the district court is *Affirmed*.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

VIMAR SEGUROS Y REASEGUROS, S.A. AND BACCHUS ASSOCIATES	)	
PLAINTIFFS,	)	
v.	)	C.A. No. 91-13345 WF
M/V SKY REEFER, HER ENGINES, ETC. AND M.H. MARITIMA, S.A.	)	
DEFENDANT.	)	

MEMORANDUM & ORDER

WOLF, D.J. April 19, 1993

Plaintiffs brought this action, *in rem*, against the defendant vessel, the Sky Reefer, and *in personam* against its owner, M.H Maritima, S.A. ("Maritima") to recover for damage to plaintiff Bacchus Associates' cargo of fruit. The fruit allegedly was spoiled during its transport aboard the Sky Reefer from Agadir, Morocco to New Bedford, Massachusetts in early 1991. Defendants have filed a motion to stay this proceeding and to compel arbitration in Tokyo, Japan pursuant to an arbitration clause contained in the Bill of Lading under which the fruit was shipped.

Plaintiff opposes this motion, and claims that it cannot be bound by the Bill of Lading's arbitration clause, arguing that the arbitration clause violates the United States Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. § 1300 *et seq.*,

and that it constitutes an unenforceable contract term of adhesion, to which plaintiff did not consent. Plaintiff further argues that the arbitration clause should not be enforced because it would impermissibly oust this Court's *in rem* jurisdiction over the vessel, and because it would be "grossly unfair and prejudicial to the plaintiffs for this court to refer this action, for which virtually all the evidence is located in the United States, to a forum so remote and inconvenient as Tokyo . . . ." Plaintiff's Memorandum in Opposition to Defendant's Motion to Stay Pending Arbitration ("Plaintiff's Memorandum") at 2. For the reasons stated below, plaintiff's motion to stay pending arbitration must be granted, pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.* (the "FAA"). At this time, however, defendant's request for an order compelling arbitration, pursuant to 9 U.S.C. § 4, is premature and will be denied.

A. *Stay Pending Arbitration*

There is no dispute that plaintiff Bacchus' cargo was shipped pursuant to a Bill of Lading issued to plaintiff, dated February 8, 1991. Complaint ¶ 2; Memorandum in Support of Motion to Compel Arbitration and to Stay Proceedings Pending Arbitration ("Defendant's Memorandum") at 2. Plaintiffs themselves contend that the Bill of Lading "became the contract of carriage between Bacchus, the consignee of the cargo in the United States, and Maritima, the vessel owner . . . ." That Bill of Lading contains the following arbitration clause:

> **Governing Law and Arbitration**
>
> (1) The contract evidenced by or contained in this Bill of Lading shall be governed by Japanese Law.[1]

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[1] The parties do not dispute that this court should apply the laws of the United States to determine the validity of the arbitration clause and its effect. This is consistent with the COGSA, 46

(2) Any dispute arising from this Bill of Lading shall be referred to arbitration in Tokyo by the Tokyo Maritime Arbitration Commission (TOMAC) at the Japan Shipping Exchange, Inc., in accordance with the Rules of TOMAC and any amendment thereto, and the award given by the arbitrators shall be final and binding on both parties.

Plaintiffs' Memorandum Exh. 1.

Section 2 of the FAA provides,

"A written provision in any maritime transaction . . . to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

9 U.S.C. § 2. Bills of lading are specifically included within the definition of "maritime transactions" under the Act. 9 U.S.C. § 1. Once a court determines that parties to a dispute are bound by an arbitration clause covering that dispute, that court is required by the FAA, upon application of one of the parties, to stay litigation until arbitration has been completed, in accordance with the parties' agreement. 9 U.S.C. § 3.[2]

U.S.C. §§ 1300 *et seq.*, and with the Bill of Lading, which contemplates that goods shipped to or from the United States will be subject to United States law. *See* Bill of Lading, appended to Defendant's Memorandum as Exhibit A, at ¶ 19.

[2] The FAA also specifically contemplates that the court will retain its *in rem* jurisdiction over a seized vessel pending arbitration, and may enter the award of the arbitrator pursuant to that *in rem* jurisdiction. 9 U.S.C. § 8; *see The Anaconda v. American Sugar Refining Co.*, 322 U.S. 42, 44 (1944); *Paramount Carriers Corp. v. Cook Industries, Inc.*, 465 F. Supp. 599 (S.D.N.Y. 1979). Therefore, plaintiffs' argument that the arbitration clause at issue impermissibly ousts this court's

Plaintiffs' arguments that the arbitration clause is void or invalid lack merit. First, plaintiff contends that the arbitration clause is invalid because it violates COGSA.[3] Specifically, plaintiff asserts that the foreign arbitration clause is invalidated by § 1303(8) of COGSA, which nullifies any provision in a contract of carriage purporting to relieve or lessen the liability of the carrier or ship for loss or damage to cargo. Plaintiff argues that the arbitration clause, calling for arbitration in Japan, violates § 1303(8) of COGSA because it will lessen the defendant's liability for the damage to plaintiff's fruit.

This argument was thoroughly considered and soundly rejected by this district in a strikingly similar case, *Citrus Marketing Board of Israel v. M/V Ecuadorian Reefer*, 754 F. Supp. 229 (D. Mass. 1990). In that case, relying on the Supreme Court's interpretation of the FAA in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), the court held that, given the strong federal policy favoring arbitration of disputes arising out of international commerce, an arbitration clause incorporated into a bill of lading was enforceable and did not conflict with COGSA. In a well-reasoned opinion, the court rejected the contrary holdings of two other courts, *State Establishment for Agricultural Product Trading v. M/V Wesermunde*, 838 F.2d 1576 (11th Cir. 1988) and *Organes Enterprises, Inc. v. The M/V Khalij Frost*, 1989 AMC 1460 (S.D.N.Y. 1989) (finding that arbitration clauses in bills of lading, calling for arbitration in a foreign jurisdiction are unenforceable because

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jurisdiction is unavailing.

[3] For the purposes of this motion the parties do not dispute that COGSA regulates their shipping contract, since the bill of lading at issue "is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade." 46 U.S.C. § 1300

bills of lading are adhesion contracts and such arbitration clauses violate COGSA). The court pointed out that the cases denying enforcement of arbitration clauses did so without proper regard for the Supreme Court's mandate that lower courts discard their historical distrust of arbitrators, and give effect to private agreements to submit their disputes to private dispute resolution tribunals. *See Ecuadorian Reefer,* 754 F. Supp. at 233 (D. Mass. 1990); *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 481 (1989) (discussing the Court's strong endorsement of federal statutes favoring arbitration, and setting aside the outmoded presumption of disfavoring arbitration); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985)(holding that FAA requires vigorous enforcement of agreements to arbitrate); *Securities Industry Association v. Connolly*, 883 F.2d 1114, 1119 (1st Cir. 1989) (discussing Supreme Court's strong pronouncements in favor of arbitration, and stressing that "courts must be on guard for artifices in which the ancient suspicion of arbitration might reappear").

This court finds the analysis in *Ecuadorian Reefer* to be persuasive, particularly in light of the fact that the FAA, which was reenacted after the promulgation of COGSA, specifically refers to bills of lading in defining the types of agreements which might contain valid and irrevocable arbitration clauses. 9 U.S.C. §§ 1, 2; *see Indussa v. Ranborg* 377 F.2d 200, 204 n.4 (2d Cir. 1967) (Friendly, J.) (noting that FAA was reenacted after COGSA, and therefore prevails in the event of conflicting provisions). Given the strong endorsement by Congress and the President of arbitration in maritime transactions, there is no basis for finding that requiring the parties to honor the arbitration clause in the bill of lading and submit to arbitration in Tokyo would impermissibly lessen the liability of defendants, in contravention of COGSA.

The court is also not persuaded by plaintiffs' argument that the arbitration is unenforceable because it constitutes a

term of adhesion. In their reply brief, plaintiffs argue that the district court in *Ecuadorian Reefer* did not adequately consider § 2 of the FAA which provides that a court may decline to enforce an arbitration clause, "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. While this court does not reject the general proposition that an adhesional arbitration clause would be unenforceable under the FAA, plaintiffs have not here demonstrated that the arbitration clause found in the Bill of Lading constitutes such an adhesional term.

Plaintiff Bacchus Associates ("Bacchus") is an importer/wholesaler of fruit throughout New England. Affidavit of Edward T. McArdle ¶ 4. Plaintiff is evidently neither unsophisticated and unfamiliar with the negotiation of maritime shipping transactions, nor a party of relatively weak bargaining power. In fact, the record shows that plaintiff engaged in serious and successful negotiations with a third party -- the time charterer -- relating to the shipping of the cargo in question. More specifically, Bacchus negotiated in Morocco a charter party contract with the charterer that issued the relevant Bill of Lading. Defendant's Reply in Support of Motion to Compel Arbitration, Exh. A. That contract included an arbitration clause calling for arbitration in London.[4] *Id.* This suggests that Bacchus was alert to the issue of arbitration and was generally capable of representing its interests in negotiations on this issue.

More importantly, in light of the plain language of the FAA, this court is not persuaded by the cases cited by plaintiffs which suggest that bills of lading generally constitute contracts of adhesion, and which, on that basis,

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[4] Since the defendants in this case are not parties to the charter party contract, they are not subject to the London arbitration clause, and this court is not faced with conflicting arbitration provisions.

refuse to honor arbitration clauses contained therein.[5] As noted earlier, Congress and the President specifically included maritime bills of lading among the types of contracts whose arbitration clauses are to be enforced under the FAA. 9 U.S.C. § 1. This provision is, in effect, a statutory determination that arbitration clauses in maritime bills of lading are not adhesional *per se* or generally invalid. In view of this statute, the claim that bills of lading are inherently adhesional, because they generally are not subject to bargaining, is an argument which should be directed to Congress and the President, rather than to the courts.

Moreover, even if this court did find that the Bill of Lading constituted a contract of adhesion, that would not be tantamount to finding the arbitration clause unenforceable. In Massachusetts, contracts of adhesion are not unenforceable unless they are also unconscionable. *See Santos v. Lumbermens Mutual Casualty Co.*, 408 Mass. 70, 86 (1990); *Lechmere Tire & Sales Co. v. Burwick*, 360 Mass. 718, 720-21 (1972); *Greenwood Trust Co. v. Commonwealth of Massachusetts*, 776 F. Supp. 21, 40-41 (D. Mass. 1991).[6] The court finds that, despite posing some inconvenience to

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[5] *See, e.g., Organes Enterprises Inc. v. The M/V Khalij Frost*, 1989 AMC 1460; *State Establishment for Agriculture Product Trading v. M/V Wesermunde*, 838 F.2d at 1582; *Pacific Lumber & Shipping Co. Inc., v. Star Shipping A/S*, 464 F. Supp. 1314, 1315 (N.D. Wash. 1979).

[6] When deciding whether a contract to arbitrate is invalid, voidable or unenforceable "upon such grounds as exist at law or equity for the revocation of any contract" federal courts must apply state law principles, when those principles address the validity and enforceability of contracts generally. *See Perry v. Thomas*, 482 U.S. 483, 492-93 n.9 (1986). Therefore, Massachusetts contracts law determines in this case whether the arbitration clause in the Bill of Lading is unenforceable as a contract of adhesion.

plaintiffs, the arbitration clause in the Bill of lading is not unconscionable.

In their memoranda, plaintiffs proffer arguments which essentially assert unconscionability, contending that the arbitration clause is unfair, one-sided, and grossly inconvenient to plaintiffs. Plaintiffs complain that the proceedings in Japan will not be conducted in English, that a Japanese arbitrator will favor the defendant, which is a Japanese Corporation, and that the arbitrator will not apply the pertinent law. *See* Plaintiffs' Memorandum at 16-18; Plaintiffs' Surreply Memorandum at 6-7. Plaintiff's arguments suggesting bias on the part of the arbitrator, or incompetence to discern and correctly apply the governing law, amount to no more than an attempt to arouse parochial distrust of foreign tribunals and the arbitration process. However, as pointed out in *Ecuadorian Reefer*, Congress and the Supreme Court have instructed that such suspicions must now be set aside. 754 F. Supp. at 233; *Rodriguez de Quijas* 490 U.S. at 481.

Furthermore, the inconvenience to plaintiffs of having to participate in arbitration in Japan does not vitiate the otherwise valid arbitration clause. Plaintiffs claim damages in excess of $1,000,000. Plaintiffs have not demonstrated that having to take their case to Japan will prove so costly, relative to their claim, that they will effectively be deprived of a meaningful opportunity to seek redress for their alleged damages. *See Fireman's Fund American Ins. Co. v. Puerto Rican Forwarding Co.*, 493 F.2d 1294, 1297 (1st Cir. 1974) (suggesting that a choice-of-forum might be avoided by a party showing "such serious inconvenience in litigating in the selected forum that it is effectively deprived of its day in court").

Moreover, since defendant is a Japanese corporation, litigation in this court would arguably prove as inconvenient to defendant as arbitration in Japan will be to plaintiff. As

aptly articulated in defendant's brief, "[t]he world of international commercial transactions often imposes inconvenience on one party or another. Certainly . . . someone will be forced to travel . . ." Defendant's Reply Memorandum at 8. Here, plaintiffs have asserted claims based on a Bill of Lading which contains an arbitration clause requiring arbitration in Japan. Pursuant to the FAA, plaintiffs must arbitrate in Japan if they wish to seek relief in this dispute.

While the court must stay this litigation pending arbitration, under 9 U.S.C. § 3, the defendant has not demonstrated that an order compelling arbitration, pursuant to § 4, would be appropriate at this time. Defendant has not demonstrated that the plaintiff will refuse to arbitrate. Plaintiffs' opposition to defendant's motion to stay litigation was based on a reasonable dispute about the validity of the arbitration clause. This Memorandum and Order resolves the enforceability of the arbitration clause, and this court expects that plaintiffs will proceed to arbitration in the manner described in the Bill of lading. At this time, however, it would be premature to issue an injunction as prescribed by the FAA, since defendant is not yet "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate." 9 U.S.C. § 4. The denial of defendant's request for an Order compelling arbitration is, however, without prejudice to reconsideration if plaintiffs prove unwilling to comply with the arbitration clause in the governing Bill of Lading.

B. *Plaintiffs' Request for Certification Under 28 U.S.C. § 1292(b)*

In their opposition to defendant's motion, plaintiffs request that this court certify this Order for immediate interlocutory appeal pursuant to 28 U.S.C. § 1292(b).[7]

[7] 28 U.S.C. § 1292(b) provides:

> When a district judge, in making in a civil action an order not otherwise appealable . . . shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of this litigation, he shall so state in writing in such order. The Court or Appeals . . . may thereupon, in its discretion, permit an appeal to be taken from such order . . . ."

Plaintiffs' request for certification was not made by motion and was raised for the first time in their Surreply Memorandum, to which Defendant has not responded, having previously filed a Memorandum and Reply Memorandum in support of its motions to stay litigation and compel arbitration. For this reason, and because certification may delay final resolution of this case, causing prejudice to the defendant, the court will deny plaintiffs' request for certification at this time, without prejudice to possible reconsideration upon a motion and memoranda timely filed.

28 U.S.C. § 1292(b) establishes three conditions for certification of an interlocutory appeal. The order must involve a question of law (1) which is "controlling;" (2) as to which there is substantial ground for difference of opinion; and (3) whose immediate determination "may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).

In this case, this Order should be regarded as "controlling" because it requires that the dispute be referred to another tribunal for decision. Furthermore, the principle point of contention between the parties, namely whether enforcement of the arbitration clause at issue violates COGSA, is a question about which courts have disagreed. *Compare Ecuadorian Reefer*, 754 F. Supp. 229; *Kaystone Chemical v. Bow-Sun*, No. 88-5859, 1989 U.S. Dist. LEXIS 4384 (S.D.N.Y. April 19, 1989); *Nissho Iwai American*

Corp., v. M/V Sea Bridge, R-90-1238, 1991 WL 182117 (D. Md. April 25, 1991) *with State Establishment for Agricultural Product Trading v. M/V Wesermunde*, 838 F.2d 1576; *Organes Enterprises Inc. v. The M/V Khalij Frost*, 1989 AMC 1460; *Pacific Lumber & Shipping Co. Inc., v. Star Shipping A/S*, 464 F. Supp. 1314, 1315 (W.D. Wash. 1979). The Court of Appeals for the First Circuit has not yet decided this issue. Therefore, this Order implicates a question of law as to which there is substantial ground for difference of opinion, within the meaning of 28 U.S.C. § 1292(b).

However, as this court has explained previously, § 1292(b) constitutes "the statutory language equivalent of a direction to consider the probable gains and losses of immediate appeal." *United States of America ex rel. Harold LaValley v. First National Bank of Boston*, No. 86-236WF, 1990 U.S. Dist. LEXIS 9913 at *10 (D. Mass. July 30, 1990). This court is sensitive to plaintiffs' concern that submitting to arbitration in Tokyo will prove costly, and appreciates plaintiffs' desire to seek review by the Court of Appeals for the First Circuit prior to incurring that expense. On the other hand, pursuing an appeal may result in further delay of the final disposition of this action, which may prove prejudicial to defendant Maritima.[8] Furthermore, reversal of this Order by the Court of Appeals would not bring this action to a close; it would merely reinvigorate the litigation of this controversy in federal court.

Moreover, certifying this case for appeal nay result in costly delay of arbitration without resulting in an authoritative ruling from the Court of Appeals. The First Circuit has warned that the occasions warranting its interlocutory review

[8] Apparently, the costs associated with delaying arbitration persuaded Congress to amend the FAA in 1988 to provide that Orders staying litigation and compelling arbitration are not subject to interlocutory appeal, absent certification. 9 U.S.C. § 16(b).

pursuant to § 1292(b) certification "will, realistically, be few and far between." *In re San Juan Dupont Plaza Hotel Fire Litigation*, 859 F.2d 1007, 1010 n.1 (1st Cir. 1988). The party seeking interlocutory appeal under § 1292 bears the heavy burden of persuading the court that exceptional circumstances warrant "'departure from the basic policy of postponing appellate review until after entry of a final judgment.'" *Bank of New York v. Hoyt*, 108 F.R.D. 184, 190 (D.R.I. 1985) *quoting Fisons Ltd. v. United States*, 458 F.2d 1241, 1248 (7th Cir.), *cert. denied*, 405 U.S. 1041 (1972); *see also McGillicuddy v. Clements*, 746 F.2d 76, 76 n.1 (1st Cir. 1984) (admonishing that interlocutory certification "should be used sparingly and only in exceptional circumstances"). Particularly since Congress specifically has mandated a presumption against immediate appellate review of orders staying litigation under the FAA, § 1292(b) certification of such orders should be granted upon careful review and only in extraordinary circumstances. *See* 9 U.S.C. § 16(b). Plaintiff has not met its burden of demonstrating that this order warrants certification. Furthermore, defendant has not had an adequate opportunity to state its opposition, if any, to plaintiffs' request for certification. For these reasons, plaintiffs' request will be denied, without prejudice to reconsideration upon a motion timely filed.

ORDER

For the foregoing reasons, it is hereby ORDERED that:

1. Defendant's motion to stay this action pending arbitration, pursuant to 9 U.S.C. § 3, is ALLOWED.

2. Defendant's motion for an Order compelling arbitration, pursuant to 9 U.S.C. § 4 is DENIED without prejudice.

3. Plaintiffs' request for certification of this Order for interlocutory appeal, pursuant to 28 U.S.C. § 1292(b) is

DENIED without prejudice to reconsideration, should plaintiffs file by May 10, 1993 a motion and supporting memorandum requesting such reconsideration. Defendant shall by May 23, 1993 file a response to any such motion for reconsideration.

/S/ MARK L. WOLF
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

VIMAR SEGUROS Y REASEGUROS, S.A. AND BACCHUS ASSOCIATES	)	
PLAINTIFFS,	)	
v.	)	C.A. No. 91-13345 WF
M/V SKY REEFER, HER ENGINES, ETC. AND M.H. MARITIMA, S.A.	)	
DEFENDANTS.	)	

ORDER

WOLF, D.J. July 22, 1993

On April 19, 1993, this court issued a Memorandum and Order ("Memorandum & Order") staying litigation of this matter pending arbitration, pursuant to 9 U.S.C. § 3. The court rejected Plaintiffs' contention, made in opposition to Defendants' motion to stay, that the arbitration clause contained in the Bill of Lading governing this dispute was unenforceable. Specifically, this court held that the arbitration clause at issue was not void as violative of the United States Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. § 1300 *et seq*. Memorandum & Order at 4-6.

In their Surreply Memorandum in Opposition to Defendant's Motion to Compel Arbitration, Plaintiffs requested that any order staying litigation be certified for immediate interlocutory appeal, pursuant to 28 U.S.C. § 1292(b). This request was not made by motion, and

Defendants had not been afforded an opportunity to respond as of the time of this court's ruling. Largely for that reason, the court denied Plaintiffs' request for certification, but did so without prejudice to reconsideration upon a notion timely filed. Memorandum & Order at 11-14. Plaintiffs subsequently filed a motion for reconsideration, accompanied by memoranda, to which Defendants have responded. Upon consideration of these filings, and further reflection on the motion, the court will certify for immediate appeal the controlling question of whether COGSA precludes enforcement of the arbitration clause at issue in this case.

As was previously noted on page 12 of the Memorandum & Order, whether the arbitration clause violates COGSA is a "controlling question of law" under § 1292(b). Furthermore, it is a question as to which there is substantial ground for difference of opinion. Memorandum & Order at 12. In fact, this court's ruling on the issue ran contrary to the decision by the United States Court of appeals for the Eleventh Circuit in *State Establishment for Agricultural Product Trading v. M/V Wesermunde*, 838 F.2d 1576 (11th Cir. 1988).

The court is aware of the strong public policy against interlocutory appeals of orders enforcing arbitration clauses. *See* 9 U.S.C. § 16(b); *USM Corp. v. GKN Fasteners, Ltd.*, 574 F.2d 17, 20 (1st Cir. 1978); *Corion Corn. v. Chen*, 964 F.2d 55, 59 (1st Cir. 1992). The court is also mindful that interlocutory certification generally "should be used sparingly and only in exceptional circumstances." *McGillicuddy v. Clements*, 746 F.2d 76, 76 n.1 (1st Cir. 1984).

However, the precise issue that this court certifies for interlocutory appeal, whether foreign arbitration clauses in bills of lading are void under § 1303(8) of COGSA, is a question of statutory interpretation which is not fact-specific, and is particularly well-suited to immediate appellate review. It involves a serious legal issue, on which courts have disagreed, which doubtless will arise in future cases. *See*

S.A. Mineracao Da Tinidade-Samitri v. Utah International, Inc., 579 F. Supp. 1049, 1050 (S.D.N.Y. 1984), *aff'd*, 745 F.2d 190 (2d Cir. 1984) (certifying for appeal order compelling arbitration, where controlling issue was not fact-specific, would arise repeatedly, and where decision on appeal would help clarify murky area of the law). A decision by the Court of Appeals in this case will provide more certainty to, and therefore less delay in, the process of resolving maritime shipping disputes. Because the issue on certification is narrowly tailored to the COGSA question, certification here will not invite certification motions by parties seeking to forestall arbitration in future cases not involving COGSA. For these reasons, certification here is not inconsistent with the strong federal policies of honoring arbitration clauses and promoting speedy resolution of commercial disputes.

Furthermore, the court now agrees with plaintiffs that immediate appeal may materially advance the ultimate termination of this litigation. If the Court of Appeals finds that COGSA prohibits enforcement of the arbitration clause in this case, the parties will be spared the expense of arbitration in Japan, which, given the location of the Plaintiffs and several potential witnesses, could prove considerably costly. *See Banner Industries v. Central States, Southeast and Southwest Areas Pension Fund*, 663 F. Supp. 1290, 1291 (N.D. Ill. 1987), *aff'd*, 875 F.2d 1285 (7th Cir. 1987) (certifying decision referring dispute to arbitration); *Trinadade-Samitri*, 579 F. Supp. at 1051. Finally, Defendants have not demonstrated that the costs associated with immediate appeal would be unduly prejudicial, as compared with the expense and potential waste associated with pursuing arbitration in Japan, which may later be invalidated.

Accordingly, this court hereby amends its Memorandum and Order dated April 19, 1993 and certifies for immediate appeal to the Court of Appeals for the First Circuit, pursuant

to 28 U.S.C. § 1292(b), the question whether 46 U.S.C. 1303(8) nullifies an arbitration clause contained in a bill of lading governed by COGSA.

/S/ MARK L. WOLF
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
NOV 4 1994
OFFICE OF THE CLERK

No. 94-623

IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

VIMAR SEGUROS Y REASEGUROS, S.A.,
Petitioner,

v.

M/V SKY REEFER, HER ENGINES, ETC.,
AND M.H. MARITIMA, S.A.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether a foreign arbitration clause in a maritime bill of lading is invalid under Section 3(8) of the Carriage of Goods by Sea Act, 46 U.S.C. § 1303(8), or whether such a clause is enforceable under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

This brief in opposition is filed on behalf of M.H. Maritima, S.A., which is a subsidiary of Honma Senpaku Co., Ltd.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The Respondent, M.H. Maritima, S.A., respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the interlocutory judgment and opinion of the United States Court of Appeals for the First Circuit. That opinion is reported at 29 F.3d 727 (1st Cir. 1994).

REASONS FOR DENYING THE PETITION

Vimar Seguros y Reaseguros, S.A. ("Vimar") asks this Court to review an opinion of the United States Court of Appeals for the First Circuit which is undeniably interlocutory. It would be premature for the Court to consider this case before a final adjudication because the question presented could easily become moot as the action progresses. Should Vimar contest the validity of the arbitration clause on appeal from a final judgment, the parties and Court may better analyze and review that clause when the record includes the procedure for the arbitration, the outcome of the arbitration, and the result of any subsequent litigation.

Moreover, the mere existence of a conflict in decisions between the First Circuit in this case and the Eleventh Circuit in *State Establishment for Agricultural Product Trading* v. *M/V Wesermunde*, 838 F.2d 1576, *cert. denied*, 488 U.S. 916 (1988), does not warrant immediate review. Principles of judicial restraint and the traditional practice of this Court suggest that withholding review and intervention until lower courts have the opportunity to resolve their differences is the more prudent and efficient course.

Finally, a grant of certiorari is unnecessary because the opinion of the First Circuit is correct. In the face of a statutory

conflict, the First Circuit correctly determined that Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, requires the enforcement of foreign arbitration clauses in maritime bills of lading notwithstanding Section 3(8) of the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. § 1303(8).

I. Granting the Petition for a Writ of Certiorari Prior to a Final Adjudication Would be Premature.

This case arrived in the United States Court of Appeals for the First Circuit by certification from the United States District Court for the District of Massachusetts under the Interlocutory Appeals Act, 28 U.S.C. § 1292(b). Certification provided the only available route for review because, under the FAA, a decision staying court action pending arbitration is an interlocutory order which cannot be appealed absent certification. 9 U.S.C. § 16(b). This case remains at an interlocutory stage. After the arbitration in Japan concludes, Vimar may no longer wish to challenge the validity of the foreign arbitration clause. Therefore, granting certiorari before a final judgment issues would be premature.

A denial of certiorari now "[does] not establish the law of the case or amount to *res judicata* on the points raised." *Hughes Tool Co.* v. *Trans World Airlines*, 409 U.S. 363, 365 n.1 (1973) (writ of certiorari as to default judgment dismissed as improvidently granted and case remanded for ruling on damages; after final judgment and appeal, certiorari granted and default judgment reversed based on immunity defense). Therefore, dismissing this petition will neither deprive Vimar of any rights nor prejudice its ability to raise the current issue again.[1]

[1] The Court has in the past denied certiorari on interlocutory issues far more basic than the enforceability of a foreign arbitration clause. In *Indianapolis* v. *Chase National Bank*, 314 U.S. 63 (1941), the Court refused to grant certiorari on an interlocutory order to review whether diversity jurisdiction was proper. After a final decision had been rendered and appealed, the Court reviewed the issue of jurisdiction and found that the federal court had in fact lacked jurisdiction because diversity was incomplete once the parties were realigned according to their true interests.

Moreover, refusing to review this case now will save the Court time and effort in the event that the issue becomes moot after further proceedings at arbitration and in the lower courts, thereby serving "the important purpose of promoting efficient judicial administration." *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 374 (1981) (orders denying motions to disqualify counsel are not appealable final decisions under 28 U.S.C. § 1291). A refusal to review at this time would furthermore be in accord with the "strong congressional policy against piecemeal reviews, and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals." *United States* v. *Nixon*, 418 U.S. 683, 690 (1974) (district court's order requiring President to comply with subpoena *duces tecum* properly appealable as final order). That congressional policy is affirmed in the FAA, which denies interlocutory review of an order staying litigation pending arbitration, in the absence of district court certification. 9 U.S.C. § 16(b).

At this time, only two circuit courts, the First and the Eleventh, are in conflict. No other circuit courts have ruled on the issue.[2] It is not necessary for the Court to grant certiorari in every instance where the lower courts differ.[3] Justice Brennan

[2] In its petition at page 14, footnote 12, Petitioner cites to several district court opinions addressing the enforceability of foreign arbitration clauses. Far more of these cases enforce such clauses than invalidate them, suggesting widespread support for the First Circuit's opinion.

[3] Indeed, the Court does not invariably grant certiorari every time there is a conflict in the appeals courts. *See, e.g.*, Justice White's dissent from denial of certiorari in *Kamberos* v. *G.T.E. Automatic Electric, Inc.*, 454 U.S. 1060 (1981), objecting to the denial of review of a Seventh Circuit opinion interpreting Title VII which conflicted directly with a decision of the Fifth Circuit, and indirectly with a decision of the Ninth Circuit. *See also* Robert L. Stern, *Denial of Certiorari Despite a Conflict*, 66 Harv. L. Rev. 465 (1953), citing numerous cases wherein certiorari was denied although the appeals courts were in conflict.

has written of the Court's "policy of letting tolerable conflicts go unaddressed until more than two courts of appeals have considered a question." William J. Brennan, Jr., *Some Thoughts on the Supreme Court's Workload*, 66 Judicature 230 (1983). Justice Stevens has pointed out that

> experience with conflicting interpretations of federal rules may help to illuminate an issue before it is finally resolved and thus may play a constructive role in the lawmaking process. The doctrine of judicial restraint teaches us that patience in the judicial resolution of conflicts may sometimes produce the most desirable result.

John Paul Stevens, *Some Thoughts on Judicial Restraint*, 66 Judicature 177 (1982).

In keeping with these policies and principles, the Court should deny the petition for certiorari in respect of this interlocutory order until the proceedings have finally concluded and until other courts of appeals have the opportunity to address the issue.

II. Certiorari is Unnecessary Because the First Circuit Correctly Determined that the FAA Requires Enforcement of a Foreign Arbitration Clause in a Maritime Bill of Lading.

The First Circuit properly determined that the relevant provisions of the FAA and COGSA appear to be in conflict but that the clear language of the FAA mandates enforcement of arbitration clauses such as the one at issue. *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 29 F.3d 727 (1st Cir.

1994).[4] The First Circuit relied on well-established canons of statutory interpretation to resolve the conflict. 29 F.3d at 732.

The court applied two basic rules of statutory construction: first, that "a later enacted statute generally limits the scope of an earlier statute if the two laws conflict," 29 F.3d at 732, and second, that "where two statutes conflict, regardless of the priority of enactment, the specific statute ordinarily controls the general." *Id.* Both rules lead to the inescapable conclusion that the FAA controls with respect to arbitration clauses because the FAA is both a more recently enacted and a more specific statute. *Id.*

Policy concerns and the realities of the modern business world support the First Circuit's conclusion. International trade requires respect for international trading partners. "The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts." *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972) (enforcing foreign arbitration clause in maritime contract not governed by COGSA). Furthermore, Congress has expressed through the FAA a strong federal policy favoring arbitration as a method of resolving disputes. *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 29 F.3d 727, 730-31 (1st Cir. 1994), citing *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220, 226 (1987) (RICO and securities claims subject to arbitration). Together, these important concerns favor enforcement of the arbitration clause at issue.

The First Circuit's opinion here provides a thorough and reasoned treatment of all the issues. No appeals court has followed the Eleventh Circuit, although *Wesermunde* was de-

[4] For the purpose of this proceeding, the court assumed, as Petitioner argues, that COGSA invalidates such clauses because of the possibility that they might lessen a carrier's liability for damage to goods transported. 29 F.3d at 730.

cided six years ago.[5] If the Supreme Court stays its hand, other courts of appeals may elect to follow the First Circuit over the Eleventh, thereby smoothing out the wrinkles in the judicial fabric. Certiorari is unnecessary because the difference of opinion between the First and Eleventh Circuits does not approach the level of an intolerable conflict and because the First Circuit's order requiring that the arbitration clause be observed is correct.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[5] The Eleventh Circuit's decision in *Wesermunde* is devoid of any significant analysis.

No. 94-623

(H)

SUPREME COURT, U.S.
FILED
NOV 9 1994

In the Supreme Court of the United States

OCTOBER TERM, 1994

VIMAR SEGUROS Y REASEGUROS, S.A.,
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AND M.H. MARITIMA, S.A.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1994

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RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE PETITIONER

As we explained in the petition (at 10), the court of appeals has decided an important and recurring question of federal maritime law — and has done so in direct (and acknowledged) conflict with the Eleventh Circuit's decision in *State Establishment for Agricultural Product Trading* v. *M/V Wesermunde*, 838 F.2d 1576, cert. denied, 488 U.S. 916 (1988). Applying two "canons of statutory interpretation" (Pet. App. 11a), the court held that Section 2 of the Federal Arbitration Act "removes" foreign arbitration clauses "from the grasp of COGSA." The court's decision undermines the purposes of COGSA, invokes mistaken principles of statutory

construction, and imposes needless, and costly, uncertainty for maritime transactions.

Respondents concede most of this. They acknowledge (Opp. 3), as they must, that the First Circuit's decision is squarely in conflict with the Eleventh Circuit's decision in *Wesermunde*. They do not dispute that the question presented is both important and recurring. And they do not deny that the decision below creates significant difficulties for maritime commerce: as amicus Maritime Law Association puts it (Amicus Br. 10), the court of appeals' decision "deprive[s] maritime commercial interests of precisely those elements the Court has long endeavored to propagate: certainty, predictability, and uniformity."

Respondents nevertheless ask the Court to deny the petition on three grounds. First, they assert (Opp. 2) that the petition is "premature" because the case is in an interlocutory posture, and "[a]fter the arbitration in Japan concludes, [petitioner] may no longer wish to challenge the validity of the foreign arbitration clause" (*ibid.*). Second, respondents contend that the Court should withhold a grant "until other courts of appeals have the opportunity to address the issue" (*id.* at 4). Finally, respondents argue (*id.* at 4-6) that the court of appeals' decision is correct. As we show below, none of these is a persuasive reason to deny further review.

1. There is no reason to require petitioner to arbitrate its claim in Japan before it may petition this Court for further review. As respondents themselves recognize (Opp. 3), the question whether foreign arbitration clauses are enforceable is squarely presented in this case and requires no additional factual development. It is ripe for review now: as the district court explained when it certified the question for immediate review, the issue presents "a question of statutory interpretation which is not fact-specific" and "involves a serious legal issue, on which courts have disagreed, which doubtless will arise in future cases." Pet. App. 28a.

Respondents have simply "not demonstrated that the costs associated with immediate appeal would be unduly prejudicial, as compared with the expense and potential waste associated with pursuing arbitration in Japan, which may later be invalidated." *Id.* at 29a.

Moreover, petitioner's central submission is that COGSA *relieves* shippers of the burden of arbitrating overseas. It is no answer to suggest that petitioner should first submit to a vexatious (and unlawful) arbitration in Japan and only afterwards seek review of the legitimacy of such arbitration. Respondents do not explain why petitioner should be put to that burden when the question is clearly presented now, the conflict was squarely acknowledged, and the pending arbitration in Japan will shed no additional light on the legal issues at stake. Respondents no doubt hope that the burden of arbitrating in Japan (and the unpredictability of later review) would force petitioner to discount and settle its claims against its will and interest, in which event the foreign arbitration clause would take its toll and yet escape further review entirely.

2. It goes without saying that "[i]t is not necessary for the Court to grant certiorari in every case where the lower courts differ" (Opp. 3). But that is hardly a reason to deny certiorari in this case. First, as we have noted, the question whether foreign arbitration clauses may be enforced is clearly presented in this case and is ripe for review: it is a pure question of law and respondents do not deny that this case is an appropriate vehicle for resolving the issue. Second, although there is, to be sure, only one other court of appeals decision on point, it is squarely in conflict, and the court below expressly acknowledged the conflict and rejected the conflicting authority. Third, the lower federal courts have already garnered the requisite "experience with conflicting interpretations of federal rules" (Opp. 4). Indeed, as respondents concede, a wide array of district courts have

addressed the issue and reached starkly conflicting results. See Pet. 23 n.18.[1]

Finally, it is no answer to suggest, as respondents do, that the Court should simply wait for the next case. As respondents themselves recognize (Opp. 2), it is exceedingly difficult to secure appellate review of orders requiring arbitration. Absent certification, the FAA precludes review of an order staying litigation pending arbitration. 9 U.S.C. 16(b)(1). See *Ilva (USA), Inc.* v. *Alexander's Daring M/V*, 10 F.3d 255 (5th Cir. 1993) (dismissing under 9 U.S.C. 16(b) an appeal from an order staying litigation pending arbitration, despite appellant's waiver of its arbitration rights in the notice of appeal). Generally speaking, it is only when (as here) a district court agrees to certify the arbitration order under 28 U.S.C. 1292(b), and the court of appeals accepts certification, that a party can obtain review of an order enforcing a foreign arbitration clause.

In short, if respondents had their way, district courts could (and assuredly would) continue to enforce foreign arbitration clauses, effectively insulated from appellate review. For the reasons set out in our petition (at 16-24), that outcome is inconsistent with the text and purposes of COGSA and imposes needless costs and uncertainties for maritime transactions.

3. Respondents urge the Court to deny certiorari because, in their view, the court of appeals' decision is correct. Opp. 4-6. But respondents overlook all three of our challenges to the decision below on the merits. See Pet. 16-21. Respondents offer no rationale for the distinction

[1] Respondents observe that "more of these cases enforce [foreign arbitration] clauses than invalidate them." Opp. 3 n.2. Perhaps. The question, however, is not how the cases line up, but rather the fact that there is a deep and abiding conflict. Respondents concede that there is.

effectively created by the court of appeals between foreign *forum selection* clauses (which the court acknowledged are unenforceable under COGSA (see Pet. App. 6a)) and foreign *arbitration* clauses (which the court enforced). See Pet. 16-18. Nor do respondents deny that the court of appeals' decision guts the purposes of COGSA and introduces significant "uncertainty concerning the responsibilities and liabilities of carriers, the responsibilities and rights of shippers and the liabilities of underwriters who insure waterborne cargo." *Union Ins. Soc. of Canton, Ltd.* v. *Elikon*, 642 F.2d 721, 723 (4th Cir. 1981). See Pet. 18-21. And although respondents agree with the court of appeals that the FAA and COGSA are "in conflict" (Opp. 4), they never explain why the two statutes cannot be reconciled according to their plain terms. See Pet. 20-21.

4. The short of the matter is this: The court of appeals' decision is wrong, is concededly in conflict with the Eleventh Circuit's decision in *Wesermunde*, and resolves an important and recurring question of federal law (that unfortunately escapes ready appellate review in the ordinary course). Amicus Maritime Law Association — which "represents a broad constituency inclusive of ship and cargo owners, charterers, shippers, forwarders, seamen, longshoremen, passengers, insurers, and others" (Amicus Br. 2) — has put it squarely: "Without knowing which of the two approaches will apply, shippers and carriers face uncertainties that will be translated into expensive litigation. The resulting litigation will do little either to advance the important federal interests in the uniformity of maritime law or to facilitate private arbitration efforts." *Id.* at 11-12.

Respondents offer no reason why shippers and carriers should absorb those costs — costs that Congress expressly sought to minimize when it enacted COGSA. See *Uniform Ocean Bills of Lading — Hague Rules*, H.R. Rep. No. 2218, 74th Cong., 2d Sess. 7 (1936). The petition for a writ of certiorari should be granted.

CONCLUSION

For the foregoing reasons, and the reasons stated in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1994

MOTION FILED
NOV 4 1994

(3)

No. 94-623

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

VIMAR SEGUROS Y REASEGUROS, S.A.,

Petitioner,

—v.—

M/V SKY REEFER, Her engines, Etc.
and M.H. MARITIMA, S.A.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
FIRST CIRCUIT COURT OF APPEALS

MOTION BY THE MARITIME LAW ASSOCIATION OF THE UNITED STATES TO FILE *AMICUS CURIAE* BRIEF AND BRIEF IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
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MOTION BY THE MARITIME LAW ASSOCIATION OF THE UNITED STATES TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

The Maritime Law Association of the United States ("The MLA"), moves the Court for permission to file an *amicus curiae* brief in support of the petition for a writ of certiorari filed by Vimar Seguros Y Reaseguros, S.A. Petitioners have consented to the filing of the accompanying *amicus curiae* brief but *such consent has not been given, although requested, from Respondent*. Leave to file is therefore sought pursuant to Rule 37.2 of the Court.

NATURE OF APPLICANT'S INTEREST

The MLA's strong interest in this matter reflects the purposes described in its Articles of Association:

> to promote uniformity in [the] enactment and interpretation [of maritime law of the United States], to furnish a forum for the discussion and consideration of problems affecting the Maritime Law and its administration, to participate as a constituent member of the Comité Maritime International and as an affiliated organization of the American Bar Association, and to act with other associations in efforts to bring about a greater harmony in the shipping laws, regulations and practices of different nations.

Comprised of more than 3600 attorneys, academicians, and others with vital interests in maritime law, The MLA represents a broad constituency inclusive of ship and cargo owners, charterers, shippers, forwarders, seamen, longshoremen, passengers, insurers, and others.

In fulfilling its objectives, The MLA has been active in both domestic and international matters since its founding in 1899.

On the domestic front it was active in sponsoring the two statutes that are at the focus of the Petitioner's Case: the Carriage of Goods by Sea Act[1] and the Federal Arbitration Act[2]. The MLA has participated in and remains active in the formulation of other maritime legislation,[3] as well.

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1 46 U.S.C. §§ 1300-1315.

2 9 U.S.C. §§ 1-15.

3 *E.g.* Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251-1376; Convention on the International Regulations for Preventing Collisions at Sea, 28 U.S.T. 3459, as amended, T.I.A.S. 10672, Oct. 20, 1972, reprinted in 6 ***Benedict on Admiralty***, Doc. No. 3-4 (Frank L. Wiswall, Jr. ed., 7th ed. rev. 1994); see 33 C.F.R. ch. 1, subch. D, Special Note, at 160 (1987); United States Inland Navigation Rules, 33 U.S.C. §§ 2001-2073.

As a constituent member of the Comité Maritime International ("CMI") The MLA has maintained a high profile in international legal matters, working with the fifty-two other national law associations that comprise the CMI.[4] These efforts have been in furtherance of the CMI's singular purpose as described in Article 1 of its constitution:

> The Comité Maritime International is a non-governmental international organization, the object of which is to contribute by all appropriate means and activities to the unification of maritime law in all its aspects.

In addition to its CMI activities, The MLA has also been active in several projects undertaken by agencies of the United Nations, including its Commissions on Trade Law ("UNCITRAL") and Trade and Development ("UNCTAD"). It works closely with the International Maritime Organization ("IMO").

The MLA's dedication to the promotion of uniformity in maritime law has been repeatedly expressed by its membership and through the efforts of its standing committees. For example, in 1975 the MLA Standing Committee on Uniformity of U.S. Maritime Law recommended that steps be taken to persuade congressional committees "that nationwide and, in fact, world-wide uniformity in the Maritime Law is highly desirable, not only from the standpoint of those involved with

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4 These now include the national associations of Argentina, Australia and New Zealand, Belgium, Brazil, Bulgaria, Canada, Chile, China, Colombia, Costa Rica, Czechoslovakia, Denmark, Egypt, Finland, France, Federal Republic of Germany, Greece, Hong Kong, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Korea, Mexico, Morocco, The Netherlands, Nigeria, Norway, Panama, Peru, Philippines, Poland, Portugal, Senegal, Spain, Sri Lanka, Sweden, Switzerland, Turkey, United Kingdom, United States, Uruguay, Union of Soviet Socialist Republics, Venezuela and Yugoslavia.

maritime commerce but from that of the public as well." A resolution to that effect was unanimously adopted at The MLA Annual Spring Meeting on April 25, 1975.[5] A substantially identical resolution was adopted by the American Bar Association in 1976. This policy has been reaffirmed by The MLA on several occasions, most recently in a 1986 resolution.[6]

The MLA has, in furtherance of the uniformity policy and its resolutions, filed *amicus* briefs in a number of cases, including a number of briefs accepted by this Court.[7] It is the policy of The MLA to file briefs as *amicus curiae* only when important issues of maritime law are involved and the Court's decision may substantially affect the uniformity of maritime law. Such a situation exists in this case. A conflict between circuits, as is present here, not only destroys the uniformity of U.S. maritime law but also creates unpredictability in an area in which consistency is essential.

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5 MLA Minutes, MLA Doc. No. 588 at 6397-98 (1975).

6 MLA Minutes, MLA Doc. No. 669 at 8769 (1986).

7 *E.g., Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973). For a more comprehensive listing, see MLA Report, MLA Doc. No. 671 at 8862-63 (1987).

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
FIRST CIRCUIT COURT OF APPEALS

BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, AS *AMICUS CURIAE*, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The Maritime Law Association of the United States ("The MLA") respectfully submits this brief as *amicus curiae* in support of the Petition for Certiorari filed by Vimar Seguros Y Reaseguros, S.A.

INTEREST OF AMICUS CURIAE

The Applicant's interest is stated in the accompanying Motion.

SUMMARY OF ARGUMENT

The Applicant argues neither for nor against Petitioner's position. This *amicus* underscores The MLA's concern that this conflict between federal circuits be resolved in the interest of maintaining the essential uniformity of maritime law.

Uniformity of law is one of the principal underpinnings of admiralty law. This notion, imported into this country in its earliest days, is of critical importance to those engaged in oceanic commerce under the purview of the U.S. Carriage of Goods by Sea Act. This uniformity is threatened however, by a split of authority between the First and Eleventh Circuits which, at bottom, pertains to the interrelationship of the U.S. Carriage of Goods by Sea Act and the Federal Arbitration Act. Only resolution by this Court will restore the uniformity and predictability of the manner in which these statutes are applied.

ARGUMENT

1. THE EXPRESS INTENTION OF BOTH CONGRESS AND THIS COURT TO PROVIDE FOR A UNIFORM MARITIME LAW, IS THWARTED BY A DIVISION OF TWO CIRCUITS

a. Uniformity of Law is the Paramount Goal of Maritime Law in General, and of the Carriage of Goods by Sea Act in Particular.

Uniformity of law was the precise goal behind the adoption of the Carriage of Goods by Sea Act (46 U.S.C. § 1301, *et seq.*), which is the codification of an international treaty, known as the Hague Rules, to which more than 90 countries now subscribe.[1] As one commentator explained:

[1] This includes those countries that have signed and ratified the Convention as amended by the Visby Protocol.

> The legislative history of the statute makes clear that COGSA's prime purpose was (as the official title of the Hague Rules explains) the "unification of certain rules of law relating to bills of lading," not only within the United States but throughout the world. During the floor debates, the only reason given for enacting COGSA was the need to implement the Hague Rules to achieve uniformity regarding bills of lading. Both the Senate and House reports on the bill claim uniformity as the legislation's most important purpose. Testimony stressing that goal fills the congressional hearings.

Michael F. Sturley, *Observations on the Supreme Court's Certiorari Jurisdiction in Intercircuit Conflict Cases*, 67 Tex. L. Rev. 1251, 1271 (1989) (footnotes omitted).

The instant dispute involves Section 3(8) of COGSA, 46 U.S.C. § 1303(8), a key provision in assuring that its carefully struck balance of rights and obligations between shipowners and shippers is not evaded by operation of contract.[2]

Section 3(8) provides:

> Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect.

In other words, it is a provision intended to help assure that a uniform international law remains so in its application.

[2] COGSA, like the Hague Convention, embodies a careful balancing of rights, duties, and liabilities of shippers and shipowners. We refer to Petitioner's Brief in support of its Petition for a Writ of Certiorari at 3 for a discussion of this aspect of the statute. *See also* Michael J. Bonnell, *International Uniform Law in Practice—Or Where the Real Trouble Begins*, 38 Am. J. Comp. L. 865, 883 (1990).

COGSA's devotion to uniformity in the maritime law builds on a long-standing concern of this Court, which was transplanted from English law in the earliest days of the nation.[3] Justice Storey, sitting as circuit justice, urged that the very broadest interpretation of the Constitution's Admiralty Clause was compelled by, "[t]he advantages resulting to the commerce and navigation of the United States from a uniformity of rules and decisions in all maritime questions." *De Lovio v. Boit*, 7 Fed. Cas. 418, 443 (No. 3776) (C.C.D. Mass. 1815).

Uniformity of law was the compelling factor in the Court's consideration of early admiralty cases. Writing in *American Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511 (1828), Chief Justice Marshall, referring to the considerable body of admiralty jurisprudence predating the Republic, noted:

> A case in admiralty does not, in fact, arise under the constitution or laws of the United States. These cases are as old as navigation itself; and the law, admiralty and maritime, as it has existed for ages, is applied by our courts to the cases as they arise.

26 U.S. (1 Pet.) at 545-46.

This Court has repeatedly endorsed this totemic principle ever since; in 1875, opining on the nature and paramountcy of admiralty jurisdiction, Mr. Justice Bradley observed that:

> No one doubts that every nation may adopt its own maritime code. France may adopt one; England another; the United States a third; still, the convenience of the commercial world, bound together, as it is, by mutual relations of trade and intercourse, demands that, in all essential things wherein those relations bring them in contact, there should be a uniform law founded on nature

[3] England's maritime law was itself a product of a maritime code shaped by the desire for the commercial states of Europe for common rules to apply in sea-borne commerce. 7A *Moore's Federal Practice*, 2012-13; Gilmore & Black, *The Law of Admiralty*, 6-7 (2d ed. 1975).

> reason and justice. Hence the adoption by all commercial nations (our own included) of the general maritime law as the basis and groundwork of all their maritime regulations.

The Lottawanna, 88 U.S. (21 Wall.) 558, 572-73 (1875).

In sum, the Court has consistently "effectuated 'the constitutionally based principle that federal admiralty law should be 'a system of law coextensive with, and operating uniformly in, the whole country.' ' " *Miles v. Apex Marine Corp.*, 498 U.S. 19, 27 (1991) (*quoting Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 401-02 (1970), *and The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1875)).

In this context, the incorporation of the Hague Rules into U.S. law, via COGSA, is nothing less than the continuation of a centuries old effort to develop a body of law applicable to all oceanic commerce. In fact, COGSA has been described as the "rare example of a federal statute that Congress passed with more concern for its uniformity than its content." Sturley, *Supreme Courts Certiorari Jurisdiction*, 67 Tex. L. Rev. at 1271.

b. The Court Below Has Held That COGSA is in Conflict with Another Statute of Great National Interest, The Federal Arbitration Act.

The necessity for the Court's attention to this case is not propelled by COGSA considerations alone. The existing conflict pertains to the manner in which section 3(8) of COGSA coexists with another statute of significant interest to the shipping community and to the Court, the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-14.[4] With the aid of the courts, a

[4] Maritime arbitration itself has long roots. It was familiar at least as far back as Roman times. *See, e.g., Kulukundunis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 982-983 (2d Cir. 1942). Agreements to arbitrate were valid in admiralty even before passage of the FAA, reflecting long standing practice. See, *Red Cross Line v. Atlantic*

body of federal substantive law has developed to effectuate the liberal federal policy towards arbitration. This approach has been endorsed by the Courts of Appeals, and, ultimately this Court. *Moses H. Cone Memorial Hosp. v. Mercury Constr.*, 460 U.S. 1, 24-25 (1983). This policy is carefully focused. "There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Volt Info. Servs. v. Board of Trustees*, 489 U.S. 468, 476 (1989).

It is against the backdrop of these two powerful federal interests—promotion of uniformity in the maritime law and the promotion of a liberal arbitration policy—that the instant dispute presents itself.

c. The Conflict of Statutes and of the Circuits is Disruptive of Maritime Commerce.

The juxtaposition posed by the Court of Appeals in the present case (which, in requiring foreign arbitration of the dispute, would effectively subordinate operation of COGSA § 3(8)) and *State Establishment for Agricultural Product Trading v. M/V Wesermunde*, 838 F.2d 1576, (11th Cir.) *cert. denied*, 488 U.S. 916 (1988) (under which a foreign arbitration provision would be nullified by COGSA § 3(8)) manifests a long simmering division of opinion on the part of the district courts.[5] The practical effect of this unsettled state of law has been to deprive maritime commercial interests of precisely those elements the Court has long endeavored to propagate: certainty, predictability, and uniformity. Instead, carriers and traders now confront a Janus-faced state of law where shippers once confident of COGSA's protections can find their disputes unceremoniously consigned to arbitral fora

Fruit Co., 264 U.S. 109, 122 (1924). Arbitration of maritime disputes in England is recorded as early as 1320. *Id.* at 122 n.3.

[5] These opposing lines of cases are detailed in the Petition at 23 n.18.

in remote places, where unfamiliar or unfavorable rules of engagement apply, and carriers relying on the FAA can find themselves hauled into the U.S. courts despite their carefully drafted arbitration clauses.[6]

Bills of lading and ship charters routinely include arbitration clauses. While New York, London, and Paris are familiar designations, many other commercial centers are seeking to offer arbitral dispute resolution facilities, evidenced by the numerous alternative venue designations to be found in chartering and shipping documents.[7] Typically, a single sale and shipment, whether of a tanker-load of crude or a container of cornflakes, may involve, in addition to a sales contract, one or more bills of lading and ship charters. The fact that a shipper may not be a direct party to all of this documentation does not necessarily shield it from the provisions of this documentation. This is precisely the problem presented in the present case.

Without knowing which of the two approaches will apply, shippers and carriers face uncertainties that will be translated

[6] While the advantage of arbitration are well known and widely held, not all arbitral fora are equal—at least in terms of competence, experience and efficiency. In the case of one major U.S. trading partner, Japan, arbitration can be both slow and costly. The process is heavily influenced by Japanese distaste for litigation. *See, generally*, Comment, *Commercial Arbitration Between American and Japanese Business: A Japanese Perspective*, 39 Kan. L. Rev. 223, 228, n.30-31 (1990).

In Mexico, with which trade with the U.S. is burgeoning, arbitration, though long established, remains problematic. Jeffrey J. Mayer, *Recent Mexican Arbitration Reform: The Continued Influence of the "Publicistas"*, 47 U. Miami L. Rev. 913, 947-49 (1993). Arbitration decisions in Russia, have, in least certain instances have left it isolated from the rest of the commercial world. Michael J. Bonnell, *International Uniform Law in Practice,—Or Where the Real Trouble Begins*, 38 Am. J. Comp. L. 865, 874 (1990).

[7] Examples, found in standard form bills of lading include Valparaiso, Chile (Compania Chilean De Navegacion Interoceanica S.A.) and Sweden (Scanfreight).

into expensive litigation. The resulting litigation will do little either to advance the important federal interests in the uniformity of maritime law or to facilitate private arbitration efforts.

Litigation stemming from this uncertainty can impose further contortions on legislative intent. This fear is neither speculative nor imagined and is framed in bold relief by two very recent decisions that emphasize the unsatisfactory state of affairs now facing the shipping community.

Very recently, an Oregon district court ruled that Kanematsu, the consignee of cargo carried from New Orleans to Japan, was bound by bill of lading term mandating London arbitration. *Kanematsu Corp. v. M/V Gretchen W*, Civ. No. 93-1437 (D. Ore. Sept. 16, 1994).[8] Kanematsu had purchased the cargo from a grain merchant, Louis Dreyfus Corporation; the terms of sale obligated Dreyfus to ship the grain at its expense to Japan. Dreyfus chartered the GRETCHEN W and loaded the cargo, which subsequently suffered in-transit heating damage, thus triggering a lawsuit by Kanematsu against the vessel interests. Typical of sales of this sort, Kanematsu was not an actual party to the bill of lading, much less to the ship charter.[9] Kanematsu argued, *inter alia*, that London arbitration constituted precisely the sort of liability-lessening term prohibited by Section 3(8).[10] The Magistrate found the First Circuit's decision in the present case and the "strong federal policy favoring arbitration" to be persuasive elements and ordered the dispute be arbitrated in London. Findings and

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[8] Findings and recommendations by Magistrate Judge Stewart, "So Ordered" by United States District Judge Jones on September 26, 1994.

[9] The GRETCHEN W was chartered on a voyage basis from the time charterer, Hyundai. Hyundai had time chartered the ship from its owner, Black Stallion. *Kanematsu*, Findings and Recommendations, at 3.

[10] COGSA applied to the Kanematsu bill of lading by virtue of a clause paramount therein.

Recommendations at 12. Unstated in the opinion is the prospect that the plaintiff may now find its arbitration claim impaled on English's one year statute of limitation. The events which are the subject of *Kanematsu's* complaint date from December 22, 1992; the suit was initiated within the one year COGSA statute of limitations, and the findings and conclusions were so ordered on September 26, 1994. Even if an arbitration proceeding could have been commenced the very next day in London, it would have been well after expiration of the one-year limitation date applicable there. Hence it is entirely conceivable that the action will be deemed time barred by London arbitrators.

While the risk of a time bar is not directly addressed in *Kanematsu,* it is at the very center of a contemporaneous decision in the Eastern District of Louisiana. *Japan Sun Oil Co., Ltd. v. M/V Maasdijk*, Civ. No. 94-1383, 1994 U.S. Dist LEXIS 13871 (E.D.La. Sept. 29, 1994). There the plaintiff expressed the fear that once compelled to arbitrate in London, it would be foreclosed by the defendants' invocation of one year statute of limitations, which had run during the course of the Louisiana litigation. The District Court's retention of jurisdiction, "and its authority to address matters unresolved through arbitration, if any, once the London proceedings are concluded," 1994 U.S. Dist. LEXIS 13871, at *22-23, however well intentioned, serves only to add uncertainty and delay to the litigation. Neither the express purposes of COGSA nor of the FAA are well served in the circumstances. The potential dilemma posed by these cases is not solved by the filing of protective proceedings in multiple locations. This adds time and expense and promotes uncertainty, with the prospect of multiple and conflicting decisions regarding a single claim.

To reiterate, The MLA's purpose here is not to attack the decision below. The essential point is simply this: had plaintiffs in the *Kanematsu* and *Maasdijk* cases been able to anticipate arbitration instead of COGSA-based litigation, their

respective remedial efforts would not have been jeopardized. This Court should resolve the conflict.

2. REVIEW BY THE COURT WILL RESTORE UNIFORMITY AND PREDICTABILITY TO MARITIME LAW

Court review is uniquely suited to restoring order to the harmonious co-existence of two important statutes to insure the uniformity of application envisioned by their respective drafters.

A resolution that opts for either the First Circuit approach or Eleventh Circuit approach will have immediate positive effects for all concerned.

Should the Court sanction the Eleventh Circuit's analysis:

1) shippers will have confidence in the fact that Section 3(8) will continue to override foreign arbitration provisions and leave shippers free to litigate their claims in the U.S. courts;

2) carriers will factor the strategic implications of U.S. litigation in their claims handling activities;

3) U.S. Courts would maintain their role in COGSA jurisprudence.

Should the Court opt to affirm the decision below:

1) shippers will know that they must be vigilant in reviewing shipping documentation to ascertain whether they may be subject to a foreign dispute resolution process;

2) shippers may have an opportunity to negotiate an alternative forum or a freight rate to reflect the imposition of a foreign arbitral forum;

3) carriers would know to be vigilant to insert foreign arbitration clauses should they find them preferable to the prospect of U.S. litigation;

4) U.S. Court dockets would be reduced to the extent that cases are resolved in foreign arbitral fora.

In either case, the necessity to repeatedly litigate the same issue, *viz.*, which approach will prevail, evaporates. Moreover, cases are much more likely to settle with the benefit of a clearer legal landscape, which the Court's attention would bring to the issue. Finally, shippers will be able to avoid the check-mate scenario wherein a U.S. Court orders a claim to a foreign arbitral forum in which the claim has become time-barred.

3. REVIEW BY THE COURT COULD BE HELPFUL TO THE RESOLUTION OF AN INTERNATIONAL CONFLICT IN THE MARITIME LAW.

The Court's attention to the conflict is warranted, not out of blind or rote considerations for uniformity, but by concerns that extend to international commerce. As noted above, COGSA is our statutory enactment of an international convention. Due to the status of the U.S. as a trading power, any major COGSA conflicts within the U.S. have important consequences for parties well beyond our own shores. In sum, the Court's decision to entertain this matter will have deep and important reverberations in global commerce. This is important because, while uniformity may be the goal, it is inevitable that certain differences in the application of the rules will develop, resulting in an international conflict of law. Just such a conflict has developed around § 3(8) as courts in foreign countries have taken divergent views on the extent to which Article 3(8) of the Hague Rules (§ 3(8) of COGSA, 46 U.S.C. §1303(8) prohibits clauses such as these. Michael F. Sturley, *International Uniform Laws in National Courts: The Influence of Domestic Law in Conflict of Interpretation*, 27 Va. J. Int'l L. 729, 775-776. Action by this Court could be highly influential in resolving this conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: November 4, 1994

Respectfully submitted,

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(5)

No. 94-623

Supreme Court, U.S.
FILED
JAN 12 1995
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

VIMAR SEGUROS Y REASEGUROS, S.A.,

Petitioner,

—v.—

M/V SKY REEFER, her Engines, etc., and M.H. MARITIMA, S.A.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JOINT APPENDIX

RECEIVED
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PETITION FOR CERTIORARI FILED OCTOBER 5, 1994
CERTIORARI GRANTED NOVEMBER 28, 1994

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RELEVANT DOCKET ENTRIES

FIRST CIRCUIT
COURT OF APPEALS

10/7/93	MISCELLANEOUS CASE docketed. () Filed by Vimar Seguros. Certificate of service date 10/7/93 (jant)
10/7/93	MOTION filed by Petitioners Vimar Seguros requesting permission to appeal pursuant to F.R.A.P. 1292(b). Certificate of service date 10/7/93. (jant)
10/15/93	APPEARANCE filed by Attorney Stanlet McDermott on behalf of Petitioners Vimar Seguros. (jant)
10/19/93	M/V Sky Reefer and M.H. Maritima, S.A.'a answer in opposition to petition for appeal pursuant to 28 U.S.C. 1292(b), received and filed. Certificate of service date 10/18/93. (jant)
11/1/93	ORDER: by Chief Judge Stephen G. Breyer, Judge Juan R. Torruella, Judge Bruce M. Selya granting motion motion for permission to appeal pursuant to F.R.A.P. 1292(b). (jant)
11/1/93	MISCELLANEOUS CASE transferred to 93-2179. (jant)
11/1/93	JUDGMENT: Procedurally Terminated After Other Judicial Action; Transferred. Chief Judge Stephen G. Breyer; Judge Juan R. Torruella; Judge Bruce M. Selya. (jant)
11/1/93	RECORD ON APPEAL filed: 1 volume(s). Appellant's Brief Due 12/6/93. (jant)
11/4/93	ATTORNEY Jeffrey S. King for Appellees M/V Sky Reefer, John J. Finn for Appellees M/V Sky Reefer, Thomas H. Walsh for Appellees M/V Sky Reefer added to case(s) [93-2179]. (jant)

11/4/93	APPEARANCE filed by Attorney Jeffrey S. King, John J. Finn, Thomas H. Walsh on behalf of Appellees M/V Sky Reefer. (jant)
11/9/93	ATTORNEY Sharyn L. Bernstein for Appellants Vimar Seguros added to case(s) [93-2179]. (jant)
11/9/93	APPEARANCE filed by Attorney Sharyn L. Bernstein, Stanley McDermott on behalf of Appellants Vimar Seguros. (jant)
11/16/93	FEE PAID. Notice received from District Court that filing fee has been paid by the Appellant on 11/15/93. (jant)
12/6/93	MOTION filed for Appellants Vimar Seguros requesting to extend time to file Appellant's brief and appendix until 12/13/93. (jant)
12/6/93	ORDER: by Judge Norman H. Stahl granting motion to extend time to file Appellant's brief and appendix. Appellant's Appendix Now Due 12/13/93. Appellant's Brief Now Due 12/13/93 for Sharyn L. Bernstein, for Stanley McDermott. (jant)
12/8/93	FEE PAID. Notice received from District Court that filing fee has been paid by the Appellant on 11/15/93. (jant)
12/14/93	APPELLANT'S BRIEF and APPENDIX filed on behalf of Vimar Seguros. Pages: 37, Copies: 10, delivered by mail. Certificate of service date 12/13/93. (bevy)
12/15/93	CORRECTED BRIEF filed on behalf of Appellant. Pages: 36, Copies: 10, delivered by hand. Certificate of service date 12/15/93. (bevy)

1/11/94	MOTION filed by John J. Finn for Appellees M/V Sky Reefer requesting to extend the time to file Appellee's brief until 1/20/94. Certificate of service date 1/10/94. (paua)
1/11/94	ORDER: by Judge Conrad K. Cyr granting the motion to extend the time to file Appellee's brief. Appellee's Brief Now Due 1/20/94. (paua)
1/21/94	BRIEF filed by Appellees. Copies: 10. Certificate of service date 1/20/94. (bevy)
2/2/94	APPELLANT'S REPLY BRIEF on behalf of Vimar Seguros. Pages: 21. Copies: 10. Delivered by mail. Certificate of service date 2/1/94. (bevy)
3/15/94	Assigned for hearing at the April, 1994 session. (ceca)
4/8/94	CASE ARGUED 04/08/94. Breyer, Ch. J., Bownes, Stahl, JJ. (ceca)
7/7/94	JUDGMENT: Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Judge Hugh H. Bownes, Authoring Judge; Chief Judge Stephen G. Breyer; Judge Norman H. Stahl. (anne)
7/14/94	BILL OF COST filed by Jeffrey S. King for Appellees M/V Sky Reefer. Certificate of service date 7/13/94. [93-2179] (bety)
7/29/94	TAXATION of costs filed. (anne)
7/29/94	MANDATE ISSUED. (anne)
7/29/94	Original papers to follow. (anne)
8/9/94	RECORD returned. (anne)
9/29/94	Opinion can be found in Federal Reporter 29 F.3d 727 (bevy)

10/11/94	U.S. SUPREME COURT NOTICE filed regarding petition for writ of certiorari. Filed in the Supreme Court on 10/05/94. Supreme Court case number: 94-623. (anne)

RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT— MASSACHUSETTS (BOSTON)

12/20/91	1	Complaint filed (ctd) [Entry date 12/27/91]
12/20/91	—	Summons(es) issued for M/V Sky Reefer, Maritima (ctd) [Entry date 12/27/91]
12/20/91	—	Filing Fee Paid. Receipt #: 14319 Amount: $120.00. (ctd) [Entry date 12/27/91]
2/10/92	2	Claim of Ownership. fcs (jdj) [Entry date 02/11/92]
2/21/92	3	Answer to Complaint by Maritima in personam claim,and in rem claim. (jdj)
3/3/92	4	Motion by Reaseguros, Bacchus special admission of counsel fcs (jdj)
3/3/92	5	Certificate of Good Standing by Attorney Stanley McDermott (jdj)
3/3/92	6	Notice of attorney appearance for Reaseguros by Stanley McDermott, Leo G Kailas (jdj)
3/3/92	7	Notice of attorney appearance for Bacchus by Alexander Peltz w/attached certificate of good standing (jdj)
4/22/92	8	Motion by Maritima to compel arbitration , and to to stay proceedings.filed cs (jdj) [Entry date 04/27/92]
4/22/92	9	Memorandum by Maritima in support of [8-1] motion to compel arbitration, [8-2] motion to stay proceedings (jdj) [Entry date 04/27/92]

5/6/92	10	STIPULATION by Reaseguros, Bacchus, Sky Reefer, M/V, Maritima, extending time to file opposition to mtn to compel and to stay to 5/13/92 (jdj)
5/11/92	11	STIPULATION by Reaseguros, Bacchus, Sky Reefer, M/V, Maritima, extending time to respond to mtn to compel to 5/20/92 (jdj)
5/21/92	12	Affidavit of Edward T McArdle (jdj)
5/21/92	13	Memorandum by Reaseguros, Bacchus in opposition to [8-2] motion to stay proceedings (jdj)
6/1/92	14	Motion by Maritima for leave to file reply filed (sad) [Entry date 06/02/92]
6/2/92	—	Judge Mark L. Wolf . Endorsed Order granting [14-1] motion for leave to file reply (jdj)
6/2/92	15	Reply by Sky Reefer, M/V, Maritima to response to [8-1] motion to compel arbitration (jdj)
6/5/92	16	Motion by Reaseguros for leave to file Surreply Memorandum (jdj) [Entry date 06/08/92]
6/8/92	—	Judge Mark L. Wolf . Endorsed Order granting [16-1] motion for leave to file Surreply Memorandum (jdj)
6/8/92	17	Reply by Reaseguros to response to [8-1] motion to compel arbitration (jdj)
4/26/93	18	Judge Mark L. Wolf . Memorandum and Order denying [8-1] motion to compel arbitration, granting [8-2] motion to stay proceedings, denying [4-1] motion special admission of counsel reconsideration motion to be filed by 5/10/93 response due 5/23 (jdj)

4/27/93	—	Case closed/stayed per order of D.J. (see #18) (jdj)
5/11/93	19	Motion by Reaseguros for reconsideration of [18-1] memorandum order (jdj)
5/11/93	20	Memorandum by Reaseguros in support of [19-1] motion for reconsideration of [18-1] memorandum order (jdj)
5/25/93	21	Response by Maritima, Sky Reefer, M/V in opposition to [19-1] motion for reconsideration of [18-1] memorandum order (jdj)
6/2/93	22	Reply by Bacchus, Reaseguros to response to [19-1] motion for reconsideration of [18-1] memorandum order (jdj)
7/22/93	23	Judge Mark L. Wolf . Order amending Memorandum & Order of 4/19/93 and certifying for immediate appeal to the Court of Appeals for the first circut. (jdj)
9/16/93	—	Upon notification from plaintiffs attorney that the 7/22/93 Memorandum & Order was not recieved, it has consequently been mailed this date,9/16/93 to all counsel. (jdj) [Edit date 09/16/93]
9/29/93	24	Motion by Bacchus, Reaseguros to extend time for Interlocutory Appeal, FILED.(c/s) (cmg) [Entry date 10/01/93]
9/29/93	—	Judge Mark L. Wolf . Endorsed Order granting [24-1] motion to extend time for Interlocutory Appeal . . . ORDERED that plaintiffs shall have 10 days from date of this Order to appeal from Memorandum and Order issued on 4/19/93, FILED.(cc/cl) (cmg) [Entry date 10/01/93]

11/1/93	25	Order from Court of Appeals, ENTERED. ". . .petition for leave to appeal under 28 U.S.C. Sec. 1292(b) is granted." (eaf) [Entry date 11/09/93]
11/9/93	—	Transmitted supplemental record on appeal: district court pleadings (eaf)
11/9/93	—	Transmitted supplemental record on appeal: district court record (eaf) [Entry date 11/10/93]
11/10/93	26	Letter filed by Stanley McDermott dated 11/8/93 to Mr Scigliano Re: attached check for $105 (jdj)
11/17/93	—	USCA appeal fees received $ 105.00 (eaf)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 93-2179

VIMAR SEGUROS Y REASEGUROS, S.A.,

Plaintiffs, Appellants,

—v.—

M/V SKY REEFER, HER ENGINES ETC.,
and M.H. MARITIMA, S.A.,

Defendants, Appellees.

JUDGMENT
Entered: July 7, 1994

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By The Court:

FRANCIS P. SCIGLIANO, Clerk

By: [ILLEGIBLE]
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 93-2179

VIMAR SEGUROS Y REASEGUROS, S.A.,

Plaintiffs, Appellants,

—v.—

M/V SKY REEFER, HER ENGINES ETC.,
and M.H. MARITIMA, S.A.,

Defendants, Appellees.

ERRATA SHEET

The opinion of this court issued on July 7, 1994, is amended as follows:

On page 8, first full paragraph, line 1: Replace "Moveover" with "Moreover."

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

No. 91-13345 WF

VIMAR SEGUROS Y REASEGUROS, S.A.
and BACCHUS ASSOCIATES

Plaintiffs,

—versus—

M/V SKY REEFER, her engines, etc., *in rem*,
and M.H. MARITIMA, S.A., *in personam*

Defendants.

COMPLAINT

Plaintiffs Vimar Seguros y Reaseguros, S.A. ("Vimar") and Bacchus Associates ("Bacchus"), for their complaint against the M/V SKY REEFER, her engines, etc., *in rem*, and M. H. Maritima, S.A. ("Maritima"), *in personam*, in a cause of action both civil and maritime, aver as follows:

1.

Jurisdiction is based on 28 U.S.C. § 1333 and venue in this district is proper under 28 U.S.C. § 1391(b)(2). This is an admiralty and maritime claim within the meaning of Rule 9(h) of the Federal Rules of Civil Procedure.

2.

Vimar is a corporation organized and existing under the laws of Spain with its principal place of business in Madrid. At all pertinent times it insured that certain cargo of Moroccan oranges and lemons laden on board the SKY REEFER ("the cargo") and transported from Agadir, Morocco to New Bedford, Massachusetts under that certain Agadir/New Bedford bill of lading No. 1 dated February 8, 1991.

3.

Bacchus is a general partnership existing under the laws of the State of New York with its principal place of business in New York, N.Y. At all pertinent times it was the owner of the cargo, the holder in due course of the aforesaid bill of lading and the insured under Vimar's policy of insurance on the cargo.

4.

The SKY REEFER is a four hatch refrigerated cargo vessel of 5,132 gross tons, bearing Official Number 18163-89 under the Panamanian flag. During the pendency of process herein it will be within this district and the jurisdiction of this Court.

5.

Maritima is a corporation organized under the laws of Panama and was at all material times the owner and/or operator of the SKY REEFER, doing business in this district and within the jurisdiction of this Court.

6.

On or about February 8, 1991, in Agadir, Morocco, the SKY REEFER lifted the cargo, consisting of 2,052 pallets of

Moroccan oranges and 6 pallets of Moroccan lemons, in good order and condition, for carriage to New Bedford, Massachusetts.

7.

Thereafter, the vessel sailed to New Bedford, where the cargo was discharged and delivered in a severely damaged condition, due to the negligence of Maritima or those for whom it is responsible and/or the unseaworthiness of the SKY REEFER.

8.

On account of the damage to the cargo, plaintiffs Vimar and Bacchus have sustained losses totalling approximately $1,033,442.90.

9.

On account of the damage to the cargo, Vimar, on or about October 7, 1991, paid Bacchus an insured loss in the sum of $733,442.90, pursuant to the terms and conditions of the applicable policy of insurance. Accordingly, Vimar is subrogated *pro tanto* to Bacchus's rights against Maritima and the SKY REEFER.

10.

On account of the damage to the cargo, Vimar has incurred additional surveying fees and costs in an amount now estimated to be $75,000.00.

11.

All and singular, the matters alleged are true and correct. Plaintiffs reserve the right to amend and supplement this complaint as further facts become known.

WHEREFORE, plaintiffs pray that:

1. Maritima be served with a copy of this complaint, together with a summons to appear and answer under oath all and singular the matters aforesaid;

2. The Court order, adjudge and decree that Maritima pay to plaintiffs the losses sustained by them, together with interest thereon and all costs and disbursements;

3. The SKY REEFER be arrested and sold to satisfy plaintiffs' claims as aforesaid; and

4. Plaintiffs have such other and further relief in the premises as in law and justice they may be entitled to receive.

Dated: Boston, Massachusetts
December 20, 1991

MILGRIM THOMAJAN & LEE P.C.

/s/ THOMAS I. ELKIND
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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION No. 91-13345-WF

VIMAR SEGUROS Y REASEGUROS, S.A.
and BACCHUS ASSOCIATES,
Plaintiffs,

—v.—

M/V SKY REEFER, her engines, etc., *in rem*,
and M.H. MARITIMA, S.A., *in personam*,
Defendants.

CLAIM OF OWNERSHIP

Now comes M. H. Maritima, S.A. ("Claimant") pursuant to Fed. R. Civ. P. Supplemental Rule C(6) and makes claim to the M/V SKY REEFER, as the same was named as a defendant in Plaintiffs' Complaint (filed December 20, 1991). The Claimant expressly restricts its appearance herein to the defense of the *in rem* claim asserted in that Complaint.

The Claimant avers that it was at the time of the filing of the Complaint herein, and still is, the true and bona fide sole owner of the M/V SKY REEFER, and that no other person is the owner thereof. Claimant further says that a Letter of Undertaking has been provided to plaintiff Bacchus Associates on behalf of Claimant as substitute security for the vessel.

The undersigned attorneys, acting on behalf of claimant owner, are duly authorized to make this claim.

WHEREFORE, Claimant prays to defend accordingly.

M. H. Maritima, S.A., as owner of
the M/V SKY REEFER, expressly
restricting its appearance
herein to the defense of
the *in rem* claim,

By its attorneys,

THOMAS H. WALSH
Thomas H. Walsh BBO #514320
John J. Finn BBO #166060
Christopher J. Trombetta
BBO #556923
BINGHAM, DANA & GOULD
150 Federal Street
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(617) 951-8000

VERIFICATION

Commonwealth of Massachusetts)
) ss.
County of Suffolk)

Thomas H. Walsh, being duly sworn, deposes and says as follows:

1. I am an attorney of the Claimant described in the foregoing Claim. I have read the Claim, and it is true to the best of my knowledge, information and belief.

2. The basis for my knowledge, information and belief is information I have received from representatives of The Japan Ship Owners' Mutual Protection & Indemnity Association, underwriters for Claimant with respect to the defendant vessel, being the same underwriters who have provided security in lieu of arrest of the vessel.

THOMAS H. WALSH
Thomas H. Walsh

Subscribed and sworn to before me this 10th day of February, 1992.

LINDA A. [ILLEGIBLE]
Notary Public

My Commission Expires: 1/3/97

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION No. 91-13345-WF

VIMAR SEGUROS Y REASEGUROS, S.A.
and BACCHUS ASSOCIATES,

Plaintiffs,

v.

M/V SKY REEFER, her engines, etc., *in rem*,
and M.H. MARITIMA, S.A., *in personam*,

Defendants.

M.H. MARITIMA'S ANSWER TO PLAINTIFFS' IN PERSONAM CLAIM

M.H. Maritima, S.A., ("Maritima") answers plaintiffs' Complaint (the "Complaint"), for purposes of orderly proceedings before this Court, but without waiver of or prejudice to its rights to seek a stay of this action pending arbitration. Maritima answers the Complaint in numbered paragraphs corresponding to those of the Complaint.

1. Paragraph 1 sets forth jurisdictional allegations to which no response is requested.

2. Maritima lacks knowledge or information sufficient to form a belief as to the incorporation and principal place of business of Vimar Seguros Y Reaseguros, S.A. Maritima admits that a certain cargo of oranges and lemons was transported from Agadir, Morocco to New Bedford, Massachusetts. Maritima states that the bill of lading referred to in Para-

graph 2 speaks for itself. Plaintiffs' allegation regarding the shipment of cargo under a certain bill of lading is a conclusion of law to which no response is required. Maritima denies the remaining allegations set forth in Paragraph 2.

3. Maritima lacks knowledge or information sufficient to form a belief as to the truth of the allegations asserted in Paragraph 3.

4. Maritima admits that the SKY REEFER is a refrigerated cargo vessel, bearing Official Number 18163-89 under the Panamanian flag. Maritima denies that the M/V SKY REEFER will be within this District and the jurisdiction of this Court during the pendency of process herein. Maritima also denies the remaining allegations set forth in Paragraph 4.

5. Maritima admits that it is a corporation organized under the laws of Panama. Maritima also admits that it was at all material times the owner of the SKY REEFER. Maritima denies the remaining allegations set forth in Paragraph 5.

6. Maritima admits that on or about February 8, 1991, in Agadir, Morocco, 2,052 pallets of Moroccan oranges and 6 pallets of Moroccan lemons were loaded on board the SKY REEFER for delivery to New Bedford, Massachusetts. Maritima denies the remaining allegations set forth in Paragraph 6.

7. Maritima admits that the SKY REEFER sailed to New Bedford, Massachusetts where the cargo was discharged. Maritima denies the remaining allegations set forth in Paragraph 7.

8. Maritima denies the allegations set forth in Paragraph 8.

9. Maritima lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 9.

10. Maritima denies the allegations set forth in Paragraph 10.

11. Maritima denies the allegations set forth in Paragraph 11.

FIRST AFFIRMATIVE DEFENSE

This Court lacks personal jurisdiction over Maritima.

SECOND AFFIRMATIVE DEFENSE

Plaintiffs have made insufficient service of process upon Maritima.

THIRD AFFIRMATIVE DEFENSE

The process utilized by the plaintiffs is insufficient.

FOURTH AFFIRMATIVE DEFENSE

Venue in this Court is improper.

FIFTH AFFIRMATIVE DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

SIXTH AFFIRMATIVE DEFENSE

The plaintiffs claim must be arbitrated and pursuant to the provisions of the Federal Arbitration Act, 9 U.S.C., §§ 1-15, this action must be stayed pending arbitration.

SEVENTH AFFIRMATIVE DEFENSE

If the plaintiffs sustained any damages, which is denied, any such damages were the result of negligent or improper stowage for which Maritima is not liable.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiffs did not have title to sue at the relevant time, and therefore, are not the real parties in interest.

NINTH AFFIRMATIVE DEFENSE

Plaintiffs failed to mitigate their alleged damages.

TENTH AFFIRMATIVE DEFENSE

Plaintiffs are barred from recovery against Maritima to the extent that plaintiffs seek recovery for loss resulting from plaintiff Bacchus Associates' ("Bacchus") own fault or the fault of Bacchus' agents, servants, employees or persons whom Bacchus controlled or for whom Bacchus is responsible.

ELEVENTH AFFIRMATIVE DEFENSE

The liability of Maritima, if any (which is specifically denied), is limited by provisions of the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. 1300, *et seq.*, and by provisions in the governing contract of carriage.

TWELFTH AFFIRMATIVE DEFENSE

If the plaintiffs sustained any damages, which is denied, any such damages were due to an act of God.

THIRTEENTH AFFIRMATIVE DEFENSE

If the plaintiff sustained any damages, which is denied, any such damages were the result of insufficiency of packing.

FOURTEENTH AFFIRMATIVE DEFENSE

If the plaintiffs sustained damages, which is denied, any such damages were the result of a peril of the sea.

FIFTEENTH AFFIRMATIVE DEFENSE

If the plaintiffs sustained any damages, which is denied, any such damages were the result of latent defects not discoverable by due diligence.

SIXTEENTH AFFIRMATIVE DEFENSE

If the plaintiffs sustained any damages, which is denied, any such damages were the result of the errors and/or omissions of third persons over whom Maritima has no control, and for whose acts Maritima has no legal responsibility.

SEVENTEENTH AFFIRMATIVE DEFENSE

If the plaintiffs sustained any damages, which is denied, any such damages were the result of the acts or omissions of the shipper or owner of the goods, or its or their agent or representative.

EIGHTEENTH AFFIRMATIVE DEFENSE

If the plaintiffs sustained any damages, which is denied, any such damages arose without the actual fault and/or privity of the carrier and without the fault or neglect of the agents or servants of the carrier.

NINETEENTH AFFIRMATIVE DEFENSE

Plaintiffs are barred from recovery by their own comparative or contributory negligence, failures, or other misconduct.

TWENTIETH AFFIRMATIVE DEFENSE

Due diligence was used to make this vessel seaworthy and to secure that it was properly manned, equipped and supplied and to make the holds and all other parts of the vessel in which goods were carried safe and fit for their reception, carriage and preservation. Accordingly, if the shipment referred to in the complaint sustained any loss, shortage or damage due to any unseaworthiness of the vessel, which is denied, Maritima is not under any liability therefor.

TWENTY-FIRST AFFIRMATIVE DEFENSE

If any shortage, loss, or damage occurred as alleged, the said shortage, loss, or damage was due to a cause for which Maritima is excused from liability under the terms of the aforesaid COGSA and/or the terms of the contract of carriage and/or the general maritime law.

TWENTY-SECOND AFFIRMATIVE DEFENSE

If any loss or damage to the goods, as alleged in the Complaint, occurred while they were on board the said vessel, which is denied; and if it be held that the loss or damage arose or resulted from the act, neglect or default of the Master, mariner, pilot or the servants of the carrier in the navigation or in the management of the vessel, Maritima is not under any liability for any such loss or damage.

TWENTY-THIRD AFFIRMATIVE DEFENSE

If plaintiffs sustained any damages, which is denied, any such damages were due to inherent vice of the cargo.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

Plaintiffs are barred from recovery against Maritima to the extent that plaintiffs seek recovery for loss or damage which is excused or not recoverable under the terms of a February 1, 1991 voyage charter party entered into between Bacchus and Nichiro Corporation.

WHEREFORE, Maritima demands that this action be dismissed, with costs in its favor, and prays that it may have such other and further relief as may be just.

M.H. MARITIMA, S.A.,

By its attorneys,

/s/ CHRISTOPHER J. TROMBETTA
Thomas H. Walsh, Jr.
BBO #514320
John J. Finn
BBO #166060
Christopher J. Trombetta
BBO #556923
BINGHAM, DANA & GOULD
150 Federal Street
Boston, MA 02110
(617) 951-8000

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION No. 91-13345-WF

VIMAR SEGUROS Y REASEGUROS, S.A.
and BACCHUS ASSOCIATES,

Plaintiffs,

—v.—

M/V SKY REEFER, her engines, etc., *in rem*,
and M.H. MARITIMA, S.A., *in personam*

Defendants.

CLAIMANT M.H. MARITIMA'S ANSWER TO PLAINTIFFS' IN REM CLAIM

Claimant M.H. Maritima, S.A., defending this action on behalf of the motor vessel SKY REEFER, and expressly restricting its appearance herein to the defense of the *in rem* claim, herewith answers plaintiffs' Complaint (the "Complaint"), for purposes of orderly proceedings before this Court, but without waiver of or prejudice to its rights to seek a stay of this action pending arbitration. Claimant answers the Complaint in numbered paragraphs corresponding to those of the Complaint.

1. Paragraph 1 sets forth jurisdictional allegations to which no response is required.

2. Claimant lacks knowledge or information sufficient to form a belief as to the incorporation and principal place of

business of Virmar Seguros Y Reaseguros, S.A. Claimant admits that a certain cargo of oranges and lemons was transported from Agadir, Morocco to New Bedford, Massachusetts. Claimant states that the bill of lading referred to in Paragraph 2 speaks for itself. Plaintiffs' allegation regarding the shipment of cargo under a certain bill of lading is a conclusion of law to which no response is required. Claimant denies the remaining allegations set forth in Paragraph 2.

3. Claimant lacks knowledge or information sufficient to form a belief as to the truth of the allegations asserted in Paragraph 3.

4. Claimant admits that the SKY REEFER is a refrigerated cargo vessel, bearing Official Number 18163-89 under the Panamanian flag. Claimant denies that the M/V SKY REEFER will be within this District and the jurisdiction of this Court during the pendency of process herein. Claimant also denies the remaining allegations set forth in Paragraph 4.

5. Claimant admits that M.H. Maritima is a corporation organized under the laws of Panama. Claimant also admits that it was at all material times the owner of the SKY REEFER. Claimant denies the remaining allegations set forth in Paragraph 5.

6. Claimant admits that on or about February 8, 1991, in Agadir, Morocco, 2,052 pallets of Moroccan oranges and 6 pallets of Moroccan lemons were loaded on board the SKY REEFER for delivery to New Bedford, Massachusetts. Claimant denies the remaining allegations, set forth in Paragraph 6.

7. Claimant admits that the SKY REEFER sailed to New Bedford, Massachusetts where the cargo was discharged. Claimant denies the remaining allegations set forth in Paragraph 7.

8. Claimant denies the allegations set forth in Paragraph 8.

9. Claimant lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 9.

10. Claimant denies the allegations set forth in Paragraph 10.

11. Claimant denies the allegations set forth in Paragraph 11.

FIRST AFFIRMATIVE DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Venue in this Court is improper.

THIRD AFFIRMATIVE DEFENSE

The plaintiffs' claim must be arbitrated and pursuant to the provisions of the Federal Arbitration Act, 9 U.S.C., §§ 1-15, this action must be stayed pending arbitration.

FOURTH AFFIRMATIVE DEFENSE

If the plaintiffs sustained any damages, which is denied, any such damages were the result of negligent or improper stowage for which the Claimant and/or vessel are not liable.

FIFTH AFFIRMATIVE DEFENSE

Plaintiffs did not have title to sue at the relevant time, and therefore, are not the real parties in interest.

SIXTH AFFIRMATIVE DEFENSE

Plaintiffs failed to mitigate their alleged damages.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiffs are barred from recovery against the Claimant and/or vessel to the extent that plaintiffs seek recovery for loss resulting from plaintiff Bacchus Associates' ("Bacchus") own fault or the fault of Bacchus' agents, servants, employees or persons whom Bacchus controlled or for whom Bacchus is responsible.

EIGHTH AFFIRMATIVE DEFENSE

The liability of the vessel and/or Claimant, if any (which is specifically denied), is limited by provisions of the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. 1300, *et seq.*, and by provisions in the governing contract of carriage.

NINTH AFFIRMATIVE DEFENSE

If the plaintiffs sustained any damages, which is denied, any such damages were due to an act of God.

TENTH AFFIRMATIVE DEFENSE

If the plaintiff sustained any damages, which is denied, any such damages were the result of insufficiency of packing.

ELEVENTH AFFIRMATIVE DEFENSE

If the plaintiffs sustained damages, which is denied, any such damages were the result of a peril of the sea.

TWELFTH AFFIRMATIVE DEFENSE

If the plaintiffs sustained any damages, which is denied, any such damages were the result of latent defects not discoverable by due diligence.

THIRTEENTH AFFIRMATIVE DEFENSE

If the plaintiffs sustained any damages, which is denied, any such damages were the result of the errors and/or omissions of third persons over whom Claimant has no control, and for whose acts Claimant has no legal responsibility.

FOURTEENTH AFFIRMATIVE DEFENSE

If the plaintiffs sustained any damages, which is denied, any such damages were the result of the acts or omissions of the shipper or owner of the goods, or his or their agent or representative.

FIFTEENTH AFFIRMATIVE DEFENSE

If the plaintiffs sustained any damages, which is denied, any such damages arose without the actual fault and/or privity of the carrier and without the fault or neglect of the agents or servants of the carrier.

SIXTEENTH AFFIRMATIVE DEFENSE

Plaintiffs are barred from recovery by their own comparative or contributory negligence, failures, or other misconduct.

SEVENTEENTH AFFIRMATIVE DEFENSE

Due diligence was used to make this vessel seaworthy and to secure that it was properly manned, equipped and supplied

and to make the holds and all other parts of the vessel in which goods were carried safe and fit for their reception, carriage and preservation. Accordingly, if the shipment referred to in the complaint sustained any loss, shortage or damage due to any unseaworthiness of the vessel, which is denied, neither the vessel nor the Claimant is under any liability therefor.

EIGHTEENTH AFFIRMATIVE DEFENSE

If any shortage, loss, or damage occurred as alleged, the said shortage, loss, or damage was due to a cause for which the Claimant and/or vessel is excused from liability under the terms of COGSA and/or the terms of the contract of carriage and/or the general maritime law.

NINETEENTH AFFIRMATIVE DEFENSE

If any loss or damage to the goods, as alleged in the Complaint, occurred while they were on board the said vessel, which is denied; and if it be held that the loss or damage arose or resulted from the act, neglect or default of the Master, mariner, pilot or the servants of the carrier in the navigation or in the management of the vessel, neither the vessel nor the Claimant is under any liability for any such loss or damage.

TWENTIETH AFFIRMATIVE DEFENSE

If plaintiffs sustained any damages, which is denied, any such damages were due to inherent vice of the cargo.

TWENTY-FIRST AFFIRMATIVE DEFENSE

Plaintiffs are barred from recovery against the Claimant and/or vessel to the extent that plaintiffs seek recovery for

loss or damage which is excused or not recoverable under the terms of a February 1, 1991 voyage charter party entered into between Bacchus and Nichiro Corporation.

WHEREFORE, Claimant demands that this action be dismissed, and that its security be released, with costs in its favor, and prays that it may have such other and further relief as may be just.

M.H. Maritima, S.A., as owner and claimant of the M/V SKY REEFER, expressly restricting its appearance herein to the defense of the *in rem* claim,

By its attorneys,

/s/ CHRISTOPHER J. TROMBETTA

Thomas H. Walsh, Jr.
BBO #514320
John J. Finn
BBO #166060
Christopher J. Trombetta
BBO #556923
BINGHAM, DANA & GOULD
150 Federal Street
Boston, MA 02110
(617) 951-8000

[LETTERHEAD OF BINGHAM, DANA & GOULD]

February 19, 1991

Bacchus Associates
22 Row B
Hunts Point
Bronx, New York

re: "SKY REEFER" Alleged Cargo Damage
New Bedford, MA - February 1991

Dear Sirs:

In consideration of your agreeing not to arrest the M/V SKY REEFER and agreeing not to seize or attempt to seize any other ships or property belonging to M.H. Maritima, S.A., all in respect of the claims referred to in paragraph 1 below, The Japan Ship Owners' Mutual Protection and Indemnity Association hereby undertakes and agrees,

1. To file or cause to be filed a claim of owner of the M/V SKY REEFER on behalf of the owners of said vessel, in any proceedings which you timely commence against the vessel in the United States District Court for the District of Massachusetts for loss, damage or expense arising out of the alleged damage to cargo discharged at New Bedford, Massachusetts between February 17-19, 1991; and

2. In the event a final decree (after appeal, if any) be entered in your favor against the M/V SKY REEFER and/or her owner for the damage in question, whether on an arbitration award or otherwise, then the undersigned Association agrees to pay and satisfy said final decree for any sum up to but not exceeding USD 500,000 plus interest and costs, (including costs of attorneys fees, if any be awarded), or any lesser amount decreed by the court or arbitrators, or settled between the parties without final decree being rendered; and

3. Upon demand to cause to be filed a bond in form and sufficiency of surety satisfactory to the court in the above amount securing your claims against the said vessel in the aforementioned proceedings. It is understood and agreed that in the event the bond referred to in paragraph 3 herein is filed, then the undersigned Association shall be released from the obligations provided for in paragraph 2 herein.

It is understood and agreed that all of the foregoing is without prejudice to any claim, rights or defenses, including rights to limitation of, or exoneration from, liability which the M/V SKY REEFER and/or her owner may have under the law applicable to your above-described claims, none of which are to be regarded as waived, and the giving of this letter of undertaking is not to be construed as an admission of liability.

It is further understood that this letter is intended to place you in the same position, to the extent herein provided, as if an admiralty bond or undertaking in the customary form in the principal sum of USD 500,000 had been provided by the owner of said vessel to obtain the release of the M/V SKY REEFER had she been arrested for the claims secured hereby.

It is understood and agreed that the execution of this letter by Thomas H. Walsh, Jr., and Bingham, Dana & Gould shall not be construed as binding upon him personally nor binding upon the firm of Bingham, Dana & Gould, but is to be binding only upon The Japan Ship Owners' Mutual Protection and Indemnity Association.

Very Truly yours,

THE JAPAN SHIP OWNER'S MUTUAL PROTECTION AND INDEMNITY ASSOCIATION

By: BINGHAM, DANA & GOULD

By: _____

Thomas H. Walsh, Jr.

(As Attorney-in-Fact for the above limited purpose only as per telex authority received by Bingham, Dana & Gould from the Japan Ship Owners' Mutual Protection and Indemnity Association on February 19, 1991.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION No. 91-13345-WF

VIMAR SEGUROS Y REASEGUROS, S.A.
and BACCHUS ASSOCIATES,

Plaintiffs,

—v.—

M/V SKY REEFER, her engines etc., *in rem*,
and M.H. MARITIMA, S.A., *in personam*,

Defendants.

MOTION TO COMPEL ARBITRATION AND TO
STAY PROCEEDINGS PENDING ARBITRATION

M.H. Maritima, S.A. ("Maritima") hereby moves for a stay of the captioned proceedings pending arbitration.

Specifically, Maritima moves that this Court:

1. Stay the captioned proceedings pending arbitration of the present dispute in Tokyo, Japan, as provided for in the arbitration clause contained in the relevant bill of lading;

2. Stay all discovery in the captioned proceedings pending arbitration or the outcome of the court's decision regarding this motion; and

3. Compel arbitration in Tokyo, Japan of the present dispute between the parties as required by the arbitration clause contained in the relevant bill of lading.

As grounds therefor Maritima relies on the Memorandum submitted herewith.

WHEREFORE, Maritima requests that its Motion to Compel Arbitration and to Stay Proceedings Pending Arbitration be allowed.

REQUEST FOR ORAL ARGUMENT

Maritima requests oral argument regarding the issues raised in its Motion and supporting Memorandum.

M. H. Maritima, S.A.,

By its attorneys,

CHRISTOPHER J. TROMBETTA
Thomas H. Walsh, Jr.
BBO #14320
John J. Finn
BBO #166060
Christopher J. Trombetta
BB0 #556923
BINGHAM, DANA & GOULD
150 Federal Street
Boston, MA 02110
(617) 951-8000

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

C.A. No. 91-13345WF

VIMAR SEGUROS Y REASEGUROS, S.A.
and BACCHUS ASSOCIATES

Plaintiffs,

—versus—

M/V SKY REEFER, her engines, etc., *in rem*,
and M.H. MARITIMA, S.A., in personam

Defendants.

State of New Jersey)
:
County of Union)

Affidavit of Edward T. McArdle

Edward T. McArdle, being duly sworn, deposes and says:

1. I am the principal of McArdle Associates, P.O. Box 1319, Summit, New Jersey 07901, and regularly act as an independent consultant to the marine shipping industry, specializing in refrigerated fruit cargoes.

2. I was hired by John Mangia, the principal of Bacchus Associates ("Bacchus"), to oversee the disposition of the cargo of damaged fruit discharged *ex* the M/V SKY REEFER in New Bedford, Massachusetts in February 1991. I am familiar with the claim that Bacchus submitted to its insurers,

Vimar Seguros y Reaseguros, S.A. ("Vimar"), and the claims that Bacchus and Vimar have filed in this action.

3. I submit this affidavit in opposition to the defendants' motion to stay this action pending arbitration in Tokyo. The exhibits I refer to in this affidavit are the exhibits that are appended to plaintiffs' opposition memorandum.

4. Bacchus, a wholesaler, imports and sells perishable fruit throughout the Northeastern United States. Its practice is to sell the imported fruit to retailers on FOB terms at the entry ports in the Northeastern United States, including New Bedford, Massachusetts and New York City. Much of the fruit sold to New England retailers is imported into New Bedford.

5. As the bill of lading, Exh. 1, recites, the cargo on board the Sky Reefer consisted of 2052 pallets of oranges and 6 pallets of lemons, each pallet consisting of 63 boxes (stacked 3x3x7 on each pallet). The cargo occupied the entire reach of the vessel's four cargo holds. Bacchus purchased the fruit, which was of Moroccan origin, from Galaxie Negoce S.A., the Moroccan company listed as the shipper in the bill of lading.

6. The vessel arrived in New Bedford listing to starboard, with much of the palletized cargo crushed and broken. The apparent cause of the damage was the crew's failure to secure the stow adequately for a trans-Atlantic crossing in mid-winter. The cargo was thereupon discharged in New Bedford into the custody and control of Marine Terminal, Inc. ("Marine Terminal"), a refrigerated storage facility able to handle large perishable fruit cargoes.

7. The damaged fruit was inspected in New Bedford on one or more occasions by a number of surveyors, including, in Bacchus's behalf, by John M. Hughes, of Southampton, Pennsylvania; in Vimar's behalf, by Alan Harley, of Associated Independent Marine Surveyors, Inc. in New York; in the vessel's behalf, by Capt. John H. Wilson III of Boston; and in Marine Terminal's behalf, by Capt. Michael Taylor, the terminal manager in New Bedford.

8. Marine Terminal thereupon released the undamaged fruit to Bacchus's retail customers but was unwilling to recondition the large volume of damaged fruit from the Sky Reefer.

9. Accordingly, Bacchus, to mitigate its losses, trucked the damaged fruit to reconditioning facilities in the New York area who specialize in reconditioning damaged fruit. Such reconditioning consists, for the most part, in (a) examining the fruit; (b) repackaging the fruit that remains marketable; and (c) destroying the fruit that is not marketable. The facilities to whom Bacchus shipped the damaged fruit *ex* the Sky Reefer are: (a) Donato Bros., Inc., Buena, New Jersey; (b) Timberline Cold Storage Inc., Pitman, New Jersey; (c) Pig-Tainer Express Corp., Elizabeth, New Jersey; and (d) Lucca's Freezer & Cold Storage Inc., Hammonton, New Jersey.

10. Bacchus's out-of-pocket losses exceed $1 million. The losses consist of (a) the extra trucking costs from New Bedford to the reconditioning facilities; (b) the reconditioning expenses; (c) the value of the lost fruit; (d) the diminution in value of the fruit that, following reconditioning, was sold to retail customers at discounts; and (e) the market value loss on the fruit that could not be sold to customers on the anticipated FOB New Bedford terms. Vimar, Bacchus's insurer, has paid Bacchus $733,442.90 in respect of its losses on the Sky Reefer cargo and is subrogated to Bacchus's rights in this action to the extent of its payment to Bacchus.

11. I was responsible for submitting Bacchus's insurance claim to Transatlantic Marine Claims Agency ("TMCA"), which acted as adjusters in Vimar's behalf. I reviewed with TMCA, in order for it to process Bacchus's claim, all the third-party and resale invoices supporting Bacchus's losses.

12. The claim review undertaken by TMCA was laborious and extensive, due to the voluminous records detailing the movement of the damaged fruit from Marine Terminal in New Bedford to the various reconditioning facilities in New Jersey and eventually to Bacchus's retail customers in the New Jersey/New York area. Vimar paid Bacchus's claim based on

the extensive claim documentation that I furnished to and reviewed with TMCA.

13. The proposed arbitration in Tokyo would be extremely prejudicial to Bacchus. The surveyors who examined the damaged fruit in New Bedford and who thus are in the best position to testify concerning the cause and extent of the damage to the cargo, including the vessel's P&I surveyor, are all located in the Northeastern United States. So, too, are the Bacchus representatives who made the decisions concerning the reconditioning and resale of the damaged fruit and the personnel of the reconditioning facilities who supervised the reprocessing and repackaging of the fruit.

14. Likewise, the records documenting the reconditioning and resale of the damaged cargo were all prepared in the Northeastern United States, where the insurance claim was also submitted and adjusted. It would be extremely burdensome for Bacchus to be required to adduce all this evidence and testimony in Tokyo, in the Japanese language, simply because the bill of lading, which Bacchus had no role in preparing, contains a Tokyo arbitration clause.

15. Bacchus did not negotiate and never agreed to the Japanese choice-of-law clause and the Tokyo arbitration clause in the Nichiro Corporation form bill of lading which the shipper of the cargo, Galaxie Negoce S.A., transferred to Bacchus. Nichiro's agents issued the Nichiro-form bill of lading to Galaxie in Agadir, Morocco, and thereafter Galaxie negotiated the bill of lading to Bacchus in connection with the sale of the fruit. It is obvious that Nichiro, a Japanese company, includes the Japanese choice-of-law and Tokyo arbitration clause in the bill of lading solely for its convenience and the convenience of its Japanese insurers. Given a choice, Bacchus would never willingly agree to arbitrate with a Japanese carrier in Tokyo (a) a bill-of-lading claim that would be governed by the United States Carriage of Goods by Sea Act, where (b) virtually all the material witnesses would be located in the United States.

16. Bacchus threatened to arrest the Sky Reefer at the time of discharge in order to enforce its maritime lien on the vessel in accordance with applicable United States law. To prevent the arrest of the vessel, the vessel's P&I club furnished a undertaking in the sum of $500,000 as substitute security for the vessel. Exh. 5.

17. In the letter of undertaking the vessel's P&I club unconditionally agreed to cause an appearance to be entered in this Court in the vessel's behalf in order to perfect this Court's jurisdiction over the vessel. *Id.* ¶ 1. In the letter of undertaking, the P&I club did not purport to reserve the right to arbitrate this claim in Tokyo. Bacchus thereafter commenced this action so that this Court could (a) exercise the *in rem* jurisdiction over the vessel conferred in the letter of undertaking and thereby (b) enforce Bacchus's maritime lien over the vessel.

18. Accordingly, Bacchus respectfully requests that this Court deny Maritima's motion to stay this action pending arbitration in Tokyo.

Dated: Summit, New Jersey
May 20, 1992

Edward T. McArdle

Sworn to and subscribed
before me, Notary, this
20th day of May, 1992

Notary Public

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 91-13345-WF

VIMAR SEGUROS Y REASEGUROS, S.A.
and BACCHUS ASSOCIATES,
Plaintiffs,

—v.—

M/V SKY REEFER, her engines, etc., *in rem*,
and M.H. MARITIMA, S.A., *in personam*,
Defendants.

AFFIDAVIT OF SEIICHI NAKAMURA

I, Seiichi Nakamura, being duly sworn, depose and say:

1. Unless otherwise indicated, this affidavit is based upon my personal knowledge.

2. I am associated with the Nakamura Law Office and am a practicing attorney at law, in good standing, in Tokyo, Japan.

3. I am familiar with proceedings conducted by the Tokyo Maritime Arbitration Commission ("TOMAC") at the Japan Shipping Exchange, Inc. and the rules and law applied in such proceedings.

4. English may be and is at times spoken in proceedings conducted by TOMAC.

5. I have reviewed the complaint filed by the plaintiffs in *Vimar Seguros Y Reaseguros. S.A. and Bacchus Associated v. M/V SKY REEFER, her engines, etc., in rem, and M.H. Maritima, S.A. in personam*, C.A. No. 91-13345-WF (D. Mass.) ("the SKY REEFER action").

6. I am familiar with the facts underlying the SKY REEFER action.

7. Based on my review of the plaintiffs' complaint, my familiarity with the facts underlying the SKY REEFER action, and my knowledge of the rules and law applied in proceedings by TOMAC, I believe that the Japanese Hague Rule enactment will govern the rights and liabilities of the parties with respect to the claims asserted in the complaint.

8. The Japanese Mague Rule enactment is based on and essentially adopts the principles set forth in the Hague Rules.

/s/ SEIICHI NAKAMURA
Seiichi Nakamura

Date: May 26, 1992

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Shipper

GALAXIE NEGOCE S.A.
34, AVENUE HASSAN SEGHIR
CASABLANCA / MOROCCO

Consigned to order of

BACCHUS ASSOCIATES
22 ROW B
HUNTS POINT
TERMINAL MARKET
BRONX, N.Y.

Notify Party

BACCHUS ASSOCIATES
22 ROW B
HUNTS POINT
TERMINAL MARKET
BRONX, N.Y.

Local Vessel | From

Ocean Vessel | Voy. No. | Port of Loading
SKY REEFER | | AGADIR

Reefer
BILL OF LADING

B/L No. 0001

[STAMP OF
NICHIRO]

NICHIRO CORPORATION

SHIPPED on board the Vessel, the Goods as indicated below, in apparent good order and condition unless otherwise stated herein, to be carried to the port of discharge or so near thereto as she may safely get, and there to be delivered in like good order and condition subject to the conditions and exceptions on the face and back hereof.

One of the original Bills of Lading must be surrendered duly endorsed in exchange for the Goods or delivery order.

IN WITNESS whereof, the number of original Bills of Lading stated below have been signed, one of which being accomplished, the other(s) to be void.

J.A. 46

Port of Discharge
NEW BEDFORD

For Transhipment to

Final destination for the merchandise shipped

Particulars furnished by Shipper

Marks & Numbers	No. of P'kgs or Units	Kind of Packages or Units: Description of Goods	Temperature	Gross Weight	Measurement
GALAXIE NEGOCE	2052	PALETTES PEA 315 CONTENANT 129 231 COLIS NAVEL			
[STAMP COPY NOT NEGOTIABLE]	6	PALETTES PEA 315 CONTENANT 378 COLIS CIRTONS		KGS 2 138 549	
		CLEAN ON BOARD			
TEMP + 2°C	—	"MARKED FREIGHT COLLECT AN NOTIFY APPLICANT"			
Total number of Packages or Units (in words)		[STAMP ORIGINAL]			

Merchant's [ILLEGIBLE]

Note:
The Merchant's attention is called to the fact that according to [ILLEGIBLE] of this Bill of Lading the liability of the Carrier is, in most cases, limited in respect of loss of or damage to or in connection with the Goods.

J.A. 47

Freight and Charges	Revenue Tons	Rate	Per	Prepaid	Other

Ex. Rate	Prepaid at	Method of payment	Place & Date of Issue:
		COLLECT	AGADIR LE 6/02/91
@ ¥	Total Prepaid in Yen	Number of Original B(s)/L 3	NICHIRO CORPORATION by [SEAL AND SIGNATURE OF COMPAGNIE DE NAVIGATION DÉTROIT]

(TERMS OF BILL OF LADING CONTINUED ON BACK HEREOF)

1. Definitions

"Carrier" means the party whose name appears in the head of this Bill of Lading, including the Vessel and or her owners.

"Merchant" includes the shipper, consignor, consignee, owner and receiver of the Goods and the holder of this Bill of Lading.

"Goods" means the cargo described on the face of this Bill of Lading.

2. Acceptance

In accepting this Bill of Lading, the Merchant expressly accepts and agrees to all its terms, conditions, stipulations and exceptions whether written, typed, stamped or printed as fully as if signed by him.

3. Governing Law and Arbitration

(1) The contract evidenced by or contained in this Bill of Lading shall be governed by the Japanese law.

(2) Any dispute arising from this Bill of Lading shall be referred to arbitration in Tokyo by the Tokyo Maritime Arbitration Commission (TOMAC) of The Japan Shipping Exchange, Inc., in accordance with the Rules of TOMAC and any amendment thereto, and the award given by the arbitrators shall be final and binding on both parties.

4. Description of Goods

(1) This Bill of Lading shall be prima facie evidence of the receipt by the Carrier of the total number of packages or units enumerated overleaf.

(2) No representation is made by the Carrier as to the weight, measure, quantity, contents, quality, description, condition, marks, numbers or value of the Goods and the Carrier shall not be responsible for the accuracy thereof.

(3) The shipper warrants to the Carrier that the particulars relating to the Goods as set out overleaf have been checked by the shipper on receipt of this Bill of Lading

and that such particulars and any other particulars furnished by or on behalf of the shipper are correct.

(4) The shipper shall indemnify the Carrier against all loss, damage, delay or expenses arising or resulting from inaccuracies in or inadequacy of such particulars.

5. Exemptions

The Carrier shall not be responsible for loss or damage arising or resulting from: (1) Act, neglect, or default of the master, mariner, pilot, or the servants of the Carrier in the navigation or in the management of the Vessel; (2) Fire, unless caused by the actual fault or privity of the Carrier; (3) Perils, dangers, and accidents of the sea or other navigable waters; (4) Act of God; (5) Act of war; (6) Act of public enemies; (7) Arrest or restraint of princes, rulers or people, or seizure under legal process; (8) Quarantine restrictions; (9) Act or omission of the Merchant, his agent or representative; (10) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general; (11) Riots and civil commotions; (12) Saving or attempting to save life or property at sea; (13) Inherent defect, quality, or vice of the Goods; (14) Insufficiency of packing; (15) Insufficiency or inadequacy of marks; (16) Latent defects not discoverable by due diligence; (17) Any other cause arising without the actual fault or privity of the Carrier, or without the actual fault or neglect of the agents or servants of the Carrier.

6. Deck Cargo

The Carrier shall not be liable in any capacity whatsoever for any delay or loss of or damage to the Goods which are carried on deck and specially stated herein to be so carried, whether or not caused by the Carrier's negligence or the Vessel's unseaworthiness.

7. Hindrances, etc. Affecting Performance

If at any time the performance of the contract as evidenced by this Bill of Lading is or is likely to be affected

by any hindrance, risk, delay, difficulty or disadvantage of whatsoever kind and nature, the Carrier (whether or not the carriage is commenced) may elect

(1) to treat the performance of this contract as terminated and place the Goods at the Merchant's disposal at any place which the Carrier deems safe and convenient, whereupon the responsibility of the Carrier in respect of such Goods shall cease: or

(2) to deliver the Goods at the place designated for delivery.

In any event the Carrier shall be entitled to full freight and charges on the Goods received for transportation, and the Merchant shall pay any additional cost of carriage to and delivery and storage at such place as abovementioned.

8. Reefer Clause

(1) Seaworthiness

If before the loading of the Goods into any refrigerated holds the Carrier obtains the certificate of the Classification Society's Surveyor or other surveyor appointed either by the Merchant or the Carrier or representative of the Merchant (including the master of the other vessel from which the Vessel has received the Goods on the sea, hereinafter referred to "the Representative of the Merchant") that such refrigerated holds and the refrigerating machinery are in the opinion of the Surveyor or the other surveyor or the Representative of the Merchant fit and safe for the carriage of the Goods, the aforesaid certificate shall be conclusive evidence against the Merchant that the Vessel's refrigerated holds and refrigerating machinery were before and at the beginning of the voyage fit and safe for the reception, carriage and preservation of the Goods.

(2) Temperature Instruction

(i) If a written instruction is given by the Merchant regarding the carrying temperature of the Goods during the voyage, such instruction temperature shall apply to the period from the time when a reasonable time has elapsed after the closing of hatches thereof on to the time of the opening of the same hatches.

(ii) The carrying temperature of the Goods shall, unless otherwise instructed in writing by the Merchant, be measured at such place where the Vessel customarily carriers out the measurement thereof.

(iii) The reading of carrying temperature taken pursuant to the preceding paragraph (ii) hereof shall be used in deciding whether the instructed temperature has been maintained or not.

(3) Fluctuation of Temperature during Cargo Operation

The Carrier shall not be liable for loss of or damage to the Goods resulting from the fluctuation of the temperature in the refrigerated holds during loading, discharging or transhipping operation of the Goods.

9. Defences and Limits for Carrier, Servants, etc.

(1) The defences and limits of liability provided for in this Bill of Lading shall apply in any action against the Carrier for loss of or damage to or in connection with the Goods, whether the action be founded in contract or in tort.

(2) If an action is brought against a servant, agent or independent contractor of the Carrier, such person shall be entitled to avail himself of the defences and limits of liability which the Carrier is entitled to invoke under the Bill of Lading.

(3) The aggregate of the amounts recoverable from the Carrier and his servants. agents or independent contractors shall in no case exceed the limits provided for in this Bill of Lading.

10. Limitation of Liability

The Carrier shall in no event be liable for any loss of or damage to or in connection with the Goods in an amount exceeding One Hundred Thousand Yen in Japanese Currency (¥ 100, 000) per package or unit, unless the value of the Goods higher than this amount is declared in writing by the shipper before shipment and the nature and the value thereof inserted in this Bill of Lading and extra freight is paid as agreed upon. In such case if the actual value of the Goods per package or unit exceeds such declared value, the value shall nevertheless be deemed to be declared-value. The Carrier's liability shall not exceed such declared-value and any partial loss or damage shall be adjusted pro rata on the basis of such value.

11. Notice of Claim and Time Bar

(1) Unless notice of loss of or damage to the Goods, indicating the general nature of such loss or damage shall be given in writing to the Carrier or his agent at the port of discharge before or at the time of the removal of the Goods into the custody of the person entitled to take delivery thereof under this Bill of Lading or, if the loss or damage is not apparent, within three days of the delivery of the Goods, such removal shall be prima facie evidence of the delivery by the Carrier of the Goods as described in this Bill of Lading.

(2) In any event the Carrier shall be discharged from any liability in respect of the Goods unless arbitration is filed pursuant to Clause 3 within one year after delivery of the Goods or the date when the Goods should have been delivered.

12. Freight and Charges

(1) Freight and charges shall be deemed fully earned on receipt of the Goods by the Carrier and shall be payable in

any event, whether the Vessel and or the Goods be lost or not, or the voyage be broken up or frustrated or abandoned at any stage of the entire transit.

(2) If the particulars furnished by the shipper are incorrect, it is agreed that a sum equal to either five times the difference between the correct freight and the freight charged or to double the correct freight less the freight charged, whichever sum is the smaller, shall be payable as liquidated damages to the Carrier.

(3) The Merchant shall pay all dues, taxes and charges including consular fees levied on the Goods and all fines and or losses sustained or incurred by the Carrier in connection with laws and regulations of any government or puplic authorities in connection with the Goods.

(4) The shipper, consignor, consignee, owner and receiver of the Goods and holder of this Bill of Lading shall be jointly and severally liable to the Carrier for the payment of all freight and charges and for the performance of the obligation of each of them hereunder.

13. Optional Delivery

Optional delivery is only granted when arranged prior to the shipment of the Goods and expressed in this Bill of Lading. The Merchant desiring to avail themselves of the option so expressed must give notice to the Carrier's agent at the first port of the Vessel's call named in the option, at least 48 hours prior to the Vessel's arrival there, otherwise the Goods shall be discharged at any of the optional ports at the Carrier's choice and the Carrier's responsibility shall then cease.

14. Discharge of the Goods

(1) The Goods may be discharged, without notice, as soon as the Vessel is ready to unload, continuously day and night, Sundays and holidays included.

(2) If the Merchant fails to take the delivery of the Goods immediately the Vessel is ready to discharge them, the Carrier shall be at liberty to store the Goods at the risk and expense of the Merchant.

(3) In any case the Carrier's liability shall cease as soon as the Goods are lifted from the Vessel's deck or leave the Vessel's tackle.

(4) If the Goods are unclaimed during a reasonable time after completion of discharge or whenever, in the Carrier's option, the Goods will become deteriorated, decayed or worthless, the Carrier may, at his discretion and subject to his lien and without any responsibility attaching to him, sell, abandon or otherwise dispose of such Goods solely at the risk and expense of the Merchant.

15. Transhipment

The Carrier reserves the right of forwarding the Goods to their discharging port by any other ship or conveyance belonging either to the Carrier or any other carrier or individual.

16. Lien

The Carrier shall have a lien on the Goods for any amount due under this Bill of Lading and for general average contributions to whomever due and for the cost of recovering the same, and may enforce such lien in any reasonable manner.

17. General Average

General Average shall be adjusted and settled in Tokyo according to York-Antwerp Rules, 1974 and any amendment thereto.

18. New Jason Clause and Both to Blame Collision Clause

The New Jason Clause and Both to Blame Collision Clause, as adopted by the Documentary Committee of The Japan Shipping Exchange, Inc., which are available from

the Carrier upon request, to be considered incorporated herein.

19. Local Clause

In case this Bill of Lading covers the Goods moving to or from the U.S.A., and if it shall be adjudged that the Japanese law does not govern this Bill of Lading, then the provisions of the U.S. Carriage of Goods by Sea Act, 1936 shall govern before the Goods are loaded on and after they are discharged from the Vessel and throughout the entire time during which the Goods are in the actual custody of the Carrier.

MARITIME CHARTER

Adopted by the Documentary Committee of the Chamber of Shipping of the United Kingdom and the Documentary Committee of the Japan Shipping Exchange, Inc.

1. Shipbroker [SEAL of Japanese Company]	THE BALTIC AND INTERNATIONAL MARITIME CONFERENCE UNIFORM TIME-CHARTER (Box Layout 1974) CODE NAME: "BALTIME 1939" PART I
	2. Place and date Tokyo, 1st November,1988
3. Owners/Place of business M.H.MARITIMA, S.A.	4. Charterers/Place of business Honma Senpaku Co.,Ltd., Tokyo
5. Vessel's name M.V. SKY REEFER	6. GRT/NRT 5,132.66/3,015.77
7. Class NK, NS*, MNS*, RMC*	8. Indicated horse power 8,000 P.S.
9. Total tons d.w. (abt.) on Board of Trade summer freeboard 6,043.53	10. Cubic feet grain/bale capacity 248,945 cbft bale
11. Permanent bunkers (abt.) —	
12. Speed capability in knots (abt.) on a consumption in tons (abt.) of about 18.1 knots for bananas, 17.4 knots for full laden (See Clause 26)	
13. Present position Trading	

14. Period of hire (Cl. 1) See Clause 27	15. Port of delivery (Cl. 1) Tokyo
	16. Time of delivery (Cl. 1) 10th/18th November,1988
17. (a) Trade limits (Cl. 2) World-wide trade within I.W.L. excluding Israel.	
(b) Cargo exclusions specially agreed Live condition of motorcar and lawful dangerous cargo.	
18. Bunkers on re-delivery (state min. and max quantity) (Cl. 5) To be agreed later	
19. Charter hire (Cl. 6) To be agreed later.	20. Hire payment (state currency, method and place of payment: also beneficiary and bank account) (Cl. 6) To be agreed later.
21. Place or range of re-delivery (Cl. 7) When/where ready at one safe port in world-wide area.	22. War (only to be filled in if Section (C) agreed) (Cl. 21)
23. Cancelling date (Cl. 22) 18th November,1988	24. Place of arbitration (only to be filled in if place other than London agreed) (Cl. 23) Tokyo, Japan
25. Brokerage commission and to whom payable (Cl. 25)	

26. Numbers of additional clauses covering special provisions, if agreed Clauses 26 to 63

It is mutually agreed that this Contract shall be performed subject to the conditions contained in this Charter which shall include Part I as well as Part II, in the event of a conflict of conditions, the provisions of Part I shall prevail over those of Part II to the extent of such conflict.

One original Charter Party being made,mutually signed and possessed by Owners.

Signature (Owners) [ILLEGIBLE]	Signature (Charterers) [SEAL IN JAPANESE]

PART II

IT IS AGREED between the party mentioned in Box 3 as Owners of the Vessel named in Box 5 of the gross/net Register tonnage indicated in Box 6, classed as stated in Box 7 and of indicated horse power as stated in Box 8, carrying about the number of tons deadweight indicated in Box 9 on Board of Trade summer freeboard inclusive of bunkers, stores, provisions and boiler water, having as per builder's plan a cubic-feet grain/bale capacity as stated in Box 10, exclusive of permanent bunkers, which contain about the number of tons stated in Box 11, and fully loaded capable of steaming about the number of knots indicated in Box 12 in good weather and smooth water on a consumption of about the number of tons best Welsh coal or oil-fuel stated in Box 12, now in position as stated in Box 13 and the party mentioned as Charterers in Box 4, as follows:

1. Period, Port of Delivery, Time of Delivery. The Owners let, and the C[illegible]arterers hire the Vessel for a period of the number of calendar months indicated in Box 14 from the time (not a Sunday or a legal Holiday unless taken over) the Vessel is delivered and placed at the disposal of the Charterers ~~between 9 a.m. and 6 p.m., or between 9 a.m. and 2 p.m. if on Saturday~~, at the port stated in Box 15 in such available berth where she can safely lie always afloat, as the Charterers may direct, she being in every way fitted for ordinary cargo service.

The Vessel to be delivered at the time indicated in Box 16.

2. Trade. The Vessel to be employed in lawful trades for the carriage of lawful merchandise only between good and safe ports or places where she can safely lie always afloat within the limits stated in Box 17.

No live stock nor injurious, inflammable or dangerous goods (such as acids, explosives, calcium carbide, ferro silicon, naphtha, motor spirit, tar, or any of their products) to be shipped.

3. Owners to Provide. The Owners to provide and pay for all **[**lubricating oil, fresh water**]** provisions and wages, for insurance of the Vessel, for all deck and engine-room stores and maintain her in a thoroughly efficient state in hull and machinery during service.

The Owners to provide one winchman per hatch. If further winchmen are required, or if the stevedores refuse or are not permitted to work with the Crew, the Charterers to provide and pay qualified shore-winchmen.

4. Charterers to Provide. The Charterers to provide and pay for all ~~coals, including galley coal,~~ oil-fuel, ~~water for boilers,~~ port charges, pilotages (whether compulsory or not), canal steersmen, boatage, lights, tug-assistance, consular charges (except those pertaining to the Master, Officers and

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* Text enclosed between bold brackets **[ ]** designates marginal typewritten notations.

Crew), canal, dock and other dues and charges, including any foreign general municipality or state taxes, also all dock, harbour and tonnage dues at the ports of delivery and re-delivery (unless incurred through cargo carried before delivery or after re-delivery), agencies, commissions, also to arrange and pay for loading, trimming, stowing (including dunnage and shifting boards, excepting any already on board), unloading, weighing, tallying and delivery of cargoes, surveys on hatches, meals supplied to officials and men in their service and all other charges and expenses whatsoever including detention and expenses through quarantine (including cost of fumigation and disinfection).

All ropes, slings and special runners actually used for loading and discharging and any special gear, including special ropes, hawsers and chains required by the custom of the port for mooring to be for the Charterers' account. The Vessel to be fitted with winches, derricks, wheels and ordinary runners capable of handling lifts up to **[**5**]** 2 tons.

* * *

13. Responsibility and Exemption. The Owners only to be responsible for delay in delivery of the Vessel or for delay during the currency of the Charter and for loss or damage to goods onboard, if such delay or loss has been caused by want of due diligence on the part of the Owners or their Manager in making the Vessel seaworthy and fitted for the voyage or any other personal act or omission or default of the Owners or their Manager. ~~The Owners not to be responsible in any other case nor for damage or delay whatsoever and howsoever caused even if caused by the neglect or default of their servant.~~ The Owners not to be liable for loss or damage arising or resulting from strikes, lock-outs or stoppage or restraint of labour (including the Master, Officers or Crew) whether partial or general.

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* Text enclosed between bold brackets **[ ]** designates marginal typewritten notations.

The Charterers to be responsible for loss or damage caused to the Vessel or to the Owners by goods being loaded contrary to the terms of the Charter or by improper or careless bunkering or loading, stowing or discharging of goods or any other improper or negligent act on their part or that of their servants **[**unless caused by Master, Officers and Crew's default**]**.

* * *

23. Arbitration. Any dispute arising under the Charter to be referred to arbitration in ~~**London**~~ **[**TOKYO**]** (or such other place as may be agreed according to Box 24) one Arbitrator to be nominated by the Owners and the other by the Charterers, and in case the Arbitrators shall not agree then to the decision of an Umpire to be appointed by them, the award of the Arbitrators or the Umpire to be final and binding upon both parties.

* Text enclosed between bold brackets **[ ]** designates marginal typewritten notations.

MARITIME CHARTER

Adopted by the Documentary Committee of the Chamber of Shipping of the United Kingdom and the Documentary Committee of the Japan Shipping Exchange, Inc.

1. Shipbroker [SEAL of Japanese Company]	THE BALTIC AND INTERNATIONAL MARITIME CONFERENCE UNIFORM TIME-CHARTER (Box Layout 1974) CODE NAME "BALTIME 1939" PART I
	2. Place and date Tokyo, 1st November,1988
3. Owners/Place of business Honma Senpaku Co.,Ltd., Tokyo	4. Charterers/Place of business Nichiro Gyogyo Kaisha, Ltd., Tokyo
5. Vessel's name M.V. SKY REEFER	6. GRT/NRT 5,132.66 / 3,015.77
7. Class NK, NS*, MNS*, RMC*	8. Indicated horse power 8,000 p.s.
9. Total tons d.w. (abt.) on Board of Trade summer freeboard 6,043.53 t	10. Cubic feet grain/bale capacity 248,945 cbft bale
11. Permanent bunkers (abt.) —	
12. Speed capability in knots (abt.) on a consumption in tons (abt.) of about 18.1 knots for bananas, 17.4 knots for full laden (See Clause 26)	
13. Present position Trading.	

14. Period of hire (Cl. 1) See Clause 27	15. Port of delivery (Cl. 1) Tokyo
	16. Time of delivery (Cl. 1) 10th/18th November, 1988

17. (a) Trade limits (Cl. 2)
World-wide trade within I.W.L. excluding Israel.

(b) Cargo ~~exclusions~~ specially agreed
Live condition of motorcar and lawful dangerous cargo.

18. Bunkers on re-delivery (state min. and max. quantity) (Cl. 5)
To be agreed later.

19. Charter hire (Cl. 6) To be agreed later.	20. Hire payment (state currency, method and place of payment: also beneficiary and bank account) (Cl. 6) To be agreed later.
21. Place or range of re-delivery (Cl. 7) When/where ready at one safe port in world-wide area.	22. War (only to be filled in if Section (C) agreed) (Cl. 21) —
23. Cancelling date (Cl. 22) 18th November, 1988	24. Place of arbitration (only to be filled in if place other than London agreed) (Cl. 23) Tokyo, Japan
25. Brokerage commission and to whom payable (Cl. 25)	

26. Numbers of additional clauses covering special provisions, if agreed
Clauses 26 to 63

It is mutually agreed that this Contract shall be performed subject to the conditions contained in this Charter which shall include Part I as well as Part II. In the event of a conflict of conditions, the provisions of Part I shall prevail over those of Part II to the extent of such conflict.

One original Charter Party being made, mutually signed and possessed by Owners.

Signature (Owners) [SEAL IN JAPANESE]	Signature (Charterers) [SEAL IN JAPANESE]

PART II

IT IS AGREED between the party mentioned in Box 3 as Owners of the Vessel named in Box 5 of the gross/net Register tonnage indicated in Box 6, classed as stated in Box 7 and of indicated horse power as stated in Box 8, carrying about the number of tons deadweight indicated in Box 9 on Board of Trade summer freeboard inclusive of bunkers, stores, provisions and boiler water, having as per builder's plan a cubic-feet grain/bale capacity as stated in Box 10, exclusive of permanent bunkers, which contain about the number of tons stated in Box 11, and fully loaded capable of steaming about the number of knots indicated in Box 12 in good weather and smooth water on a consumption of about the number of tons best Welsh coal or oil-fuel stated in Box 12, now in position as stated in Box 13 and the party mentioned as Charterers in Box 4, as follows:

1. Period, Port of Delivery, Time of Delivery. The Owners let, and the Charterers hire the Vessel for a period of the number of calendar months indicated in Box 14 from the time (not a Sunday or a legal Holiday unless taken over) the Vessel is delivered and placed at the disposal of the Charterers ~~between~~ 9 a.m. ~~and~~ 6 p.m. ~~or between 9 a.m. and 2 p.m. if on Saturday~~, at the port stated in Box 15 in such available berth where she can safely lie always afloat, as the Charterers may direct, she being in every way fitted for ordinary cargo service.

The Vessel to be delivered at the time indicated in Box 16.

2. Trade. The Vessel to be employed in lawful trades for the carriage of lawful merchandise only between good and safe ports or places where she can safely lie always afloat within the limits stated in Box 17.

No live stock nor injurious, inflammable or dangerous goods (such as acids, explosives, calcium carbide, ferro silicon, naphtha, motor spirit, tar, or any of their products) to be shipped.

3. Owners to Provide. The Owners to provide and pay for all **[**lubricating oil, fresh water**]** provisions and wages, for insurance of the Vessel, for all deck and engine-room stores and maintain her in a thoroughly efficient state in hull and machinery during service.

The Owners to provide one winchman per hatch. If further winchmen are required, or if the stevedores refuse or are not permitted to work with the Crew, the Charterers to provide and pay qualified shore-winchmen.

4. Charterers to Provide. The Charterers to provide and pay for all ~~coals, including galley coal,~~ oil-fuel, ~~water for boilers,~~ port charges, pilotages (whether compulsory or not), canal steersmen, boatage, lights, tug-assistance, consular charges (except those pertaining to the Master, Officers and

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* Text enclosed between bold brackets **[ ]** designates marginal typewritten notations.

Crew), canal, dock and other dues and charges, including any foreign general municipality or state taxes, also all dock, harbour and tonnage dues at the ports of delivery and re-delivery (unless incurred through cargo carried before delivery or after re-delivery), agencies, commissions, also to arrange and pay for loading, trimming, stowing (including dunnage and shifting boards, excepting any already on board), unloading, weighing, tallying and delivery of cargoes, surveys on hatches, meals supplied to officials and men in their service and all other charges and expenses whatsoever including detention and expenses through quarantine (including cost of fumigation and disinfection).

All ropes, slings and special runners actually used for loading and discharging and any special gear, including special ropes, hawsers and chains required by the custom of the port for mooring to be for the Charterers' account. The Vessel to be fitted with winches, derricks, wheels and ordinary runners capable of handling lifts up to **[**5**]** 2 tons.

* * *

13. Responsibility and Exemption. The Owners only to be responsible for delay in delivery of the Vessel or for delay during the currency of the Charter and for loss or damage to goods on board, if such delay or loss has been caused by want of due diligence on the part of the Owners or their Manager in making the Vessel seaworthy and fitted for the voyage or any other personal act or omission or default of the Owners or their Manager. ~~The Owners not to be responsible in any other case nor for damage or delay whatsoever and howsoever caused even if caused by the neglect or default of their servants.~~ The Owners not to be liable for loss or damage arising or resulting from strikes, lock-outs or stoppage or restraint of labour (including the Master, Officers or Crew) whether partial or general.

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* Text enclosed between bold brackets **[ ]** designates marginal typewritten notations.

The Charterers to be responsible for loss or damage caused to the Vessel or to the Owners by goods being loaded contrary to the terms of the Charter or by improper or careless bunkering or loading, stowing or discharging of goods or any other improper or negligent act on their part or that of their servants **[**unless caused by Master, Officers and Crew's default**]**.

* * *

23. Arbitration. Any dispute arising under the Charter to be referred to arbitration in ~~**London**~~ **[**TOKYO**]** (or such other place as may be agreed according to Box 24) one Arbitrator to be nominated by the Owners and the other by the Charterers, and in case the Arbitrators shall not agree then to the decision of an Umpire to be appointed by them, the award of the Arbitrators or the Umpire to be final and binding upon both parties.

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* Text enclosed between bold brackets **[ ]** designates marginal typewritten notations.

MARITIME CHARTER

Adopted by the Documentary Committee of the General Council of British Shipping, London and the Documentary Committee of the Japan Shipping Exchange, Inc., Tokyo.

1. Shipbroker [SEAL of Japanese Company] [ILLEGIBLE address]	RECOMMENDED THE BALTIC AND INTERNATIONAL MARITIME CONFERENCE UNIFORM GENERAL CHARTER (AS REVISED 1922 and 1976) INCLUDING "F.I.O." ALTERNATIVE, ETC. (To be used for trades for which no approved form is in force) CODE NAME: "GENCON" PART I
	2. Place and date Krimpen a/d IJssel, 1st February 1991
3. Owners/Place of business (Cl. 1) NICHIRO CORPORATION TOKYO, JAPAN.	4. Charterers/Place of business (Cl. 1) BACCHUS ASSOCIATES Huntspoint, New York.
5. Vessel's name (Cl. 1) "SKY REEFER"	5. GRT/NRT (Cl. 1) 5132.66/3015.77
7. Deadweight cargo carrying capacity in tons (abt.) (Cl. 1) all told 6043.55	8. Present position (Cl.1) Trading
9. Expected ready to load (abt.) (Cl. 1) 5th of February, 1991	

10. Loading port or place (Cl. 1) Agadir 1 good, safe berth	11. Discharging port or place (Cl. 1) New Bedford 1 good, safe berth
12. Cargo (also state quantity and margin in Owners' option, if agreed; if full and complete cargo not agreed state "part cargo") (Cl. 1) minimum 2,000 pallets of citrus in cartons up to vessel's full capacity in Charterers' option	
13. Freight rate (also state if payable on delivered or intaken quantity) (Cl. 1) US$ 145.-- (United States Dollars onehundredandfourtyfive) per pallet on intaken quantity	14. Freight payment (state currency and method of payment; also beneficiary and bank account) (Cl. 4) prepaid on signing Bills of Lading, discountless, non returnable, ship and/or cargo lost or not lost, into Owners' account.
15. Loading and discharging costs (state alternative (a) or (b) of Cl. 5; also indicate if vessel is gearless) Free in/Liner out till point of rest	16. Laytime (if separate laytime for load, and disch. is agreed, fill in a) and b), if total laytime for load, and disch., fill in c) only) (Cl. 8)
	a) Laytime for loading 2.5 w.w. days shex uu wibon wifpon

17. Shippers (state name and address (Cl. 6)	b) Laytime for discharging
	c) Total laytime for loading and discharging
18. Demurrage rate (loading and discharging) (Cl. 7) US $8.500, -- /Free despatch	19. Cancelling data (Cl. 10) 7th of February 1991
20. Brokerage commission and to whom payable (Cl. 14) 5% of R.M.C.A. Rotterdam Marine Chartering Agents B.V., Krimpen a/d IJssel,for division as agreed	
21. Additional clauses covering special provisions. If agreed. A—Clean, dry and free of smell holds clause B—Arbitration London Both to Blame Collision clause—New Jason clause Owners' bank: The Bank of Tokyo Ltd., Marunouchi Branch Office. 4-2 Marunouchi 1—Chome, Chiyoda-Ku Tokyo, Japan. In favour of Nichiro Corporation, Tokyo. Account no. 0074047	

It is mutually agreed that this Contract shall be performed subject to the conditions contained in this Charter which shall include Part I as well as Part II. In the event of a conflict of conditions, the provisions of Part I shall prevail over those of Part II to the extent of such conflict.

Signature (Owners)	Signature (Charterers)

PART II
"Gencon" Charter (As Revised 1922 and 1976)
Including "F.I.O." Alternative, etc.

1. It is agreed between the party mentioned in Box 3 as Owners of the steamer or motor-vessel named in Box 5, of the gross/nett Register tons indicated in Box 6 and carrying about the number of tons of deadweight cargo stated in Box 7, now in position as stated in Box 8 and expected ready to load under this Charter about the date indicated in Box 9, and the party mentioned as Charterers in Box 4 that:
The said vessel shall proceed to the loading port or place stated in Box 10 or so near thereto as she may safely get and lie always afloat, and there load a full and complete cargo (if shipment of deck cargo agreed same to be at Charterers' risk) as stated in Box 12 (Charterers to provide all mats and/or wood for dunnage and any separations required, the Owners allowing the use of any dunnage wood on board if required) which the Charterers bind themselves to ship, and being so loaded the vessel shall proceed to the discharging port or place stated in Box 11 as ordered on signing Bills of Lading or so near thereto as she may safely get and lie always afloat and there deliver the cargo on being paid freight on delivered or in taken quantity as indicated in Box 13 at the rate stated in Box 13.

2. **Owners' Responsibility Clause**
Owners are to be responsible for loss of or damage to the goods or for delay in delivery of the goods only in case the loss, damage or delay has been caused by the improper or negligent stowage of the goods (unless stowage performed by shippers/Charterers or their stevedores or servants) or by personal want of due diligence on the part of the Owners or their Manager to make the vessel in all respects seaworthy and to secure that she is

properly manned, equipped and supplied or by the personal act or default of the Owners of their Manager.
And the Owners are responsible for no loss or damage or delay arising from any other cause whatsoever, even from the neglect or default of the Captain or crew or some other person employed by the Owners on board or ashore for whose acts they would, but for this clause, be responsible, or from unseaworthiness of the vessel on loading or commencement of the voyage or at any time whatsoever.
Damage caused by contact with or leakage, smell or evaporation from other goods or by the inflammable of explosive nature or insufficient package of other goods not to be considered as caused by improper or negligent stowage, even if in fact so caused.

3. **Deviation Clause**
The vessel has liberty to call at any port or ports in any order, for any purpose, to sail without pilots, to tow and or assist vessels in all situations, and also to deviate for the purpose of saving life and/or property.

4. **Payment of Freight**
The freight to be paid in the manner prescribed in Box 14 in cash without discount ~~on delivery of the cargo at mean rate of exchange ruling on day or days of payment, the receivers of the cargo being bound to pay freight on account during delivery if rendered by captain or officers~~.
Cash for vessel's ordinary disbursements at port of loading to be advanced by Charterers if required at highest current rate of exchange, subject to two per cent, to cover insurance and other expenses.

5. **Loading Discharging Costs**
* *(a) Gross Terms*
~~The cargo to be brought alongside in such a manner and to enable vessel to take the goods with her own tackle. Charterers to procure and pay the necessary men on shore or on board the lighters to do the work there, vessel only~~

~~heaving the cargo on board.~~ If the loading takes place by elevator, cargo to be put free in vessel's holds. Owners only paying trimming expenses. Any places and/or packages of cargo over two tons freight, shall be loaded, stowed and discharged by Charterers at their risk and expense. The cargo to be received by Merchants at their risk and expense, alongside the vessel not beyond the reach of her tackle.

* *(b) F.i.o. and free stowed trimmed*

The cargo shall be brought into the holds, loaded, stowed and/or trimmed ~~and taken from the holds and discharged~~ by the Charterers or their Agents, free of any risk, liability and expense whatsoever to the Owners.
The Owners shall provide winches, motive power and winchman from the Crew if requested and permitted; if not, the Charterers shall provide and pay for winchmen from shore and/or cranes, if any. (This provision shall not apply if vessel is gearless and stated as such in Box 15).

* *indicate alternative (a) or (b), as agreed, in Box 15.*

6. Laytime

* *(a) Separate laytime for loading and discharging*

The cargo shall be loaded within the number of running hours as indicated in Box 16, weather permitting, Sundays and holidays excepted, unless used, in which event time actually used shall count. ~~The cargo shall be discharged within the number of evening hours, as indicated in Box 16, weather permitting, Sundays and holidays excepted, unless used, in which event time actually used shall count.~~

* *(b) Total laytime for loading and discharging*

~~The cargo shall be loaded and discharged within the number [illegible] [illegible] running hours as indicated in Box 16, weather permitting, Sundays and holidays excepted, unless used, in which event time actually used shall count.~~

(c) Commencement of laytime (loading and discharging)

Laytime for loading and discharging shall commence at 2 p.m. if notice of readiness is given before noon and at 8 a.m. next working day if notice given during office hours after noon. Notice at loading port to be given to the Shippers named in Box 17.
Time actually used before commencement of laytime shall count.
Time lost in waiting for berth to count as loading or discharging time, as the case may be.

* *Indicate alternative (a) or (b) as agreed, in Box 16.*

7. Demurrage

The [ILLEGIBLE] as demurrage at the rate stated in Box 10 per day or pro rata for any part of a day, payable day by day, to be allowed Merchants altogether at ports of loading and discharging.

8. Lien Clause

Owners shall have a lien on the cargo for freight, dead-freight, demurrage ~~and damages for detention~~. Charterers shall remain responsible for dead-freight and demurrage ~~(including damages for detention)~~, incurred at port of loading. ~~Charterers shall also [illegible] responsible for freight and demurrage (including damages for detention) incurred at port of discharge but only to such extent as the owners have been unable to obtain payment thereof by exercising the lien on the cargo.~~

9. Bills of Lading

The Captain to sign Bills of Lading at such rate of freight as presented without prejudice to this Charterparty, but should the freight by Bills of Lading amount to less than the total chartered freight the difference to be paid to the Captain in cash on signing Bills of Lading.

10. Cancelling Clause

Should the vessel not be ready to load (whether in berth or not) on or before the date indicated in Box 19, Charterers have the option of cancelling this contract, such option to be declared, if demanded, at least 48 hours before vessel's expected arrival at port of loading. Should the vessel be delayed on account of average or otherwise, Charterers to be informed as soon as possible, and if the vessel is delayed for more than 10 days after the day she is stated to be expected ready to load. Charterers have the option of cancelling this contract, unless a cancelling date has been agreed upon.

11. General Average

General average to be settled [in London] according to York-Antwerp Rules, 1974. Proprietors of cargo to pay the cargo's share in the general expenses even if same have been necessitated through neglect or default of the Owners' servants (see clause 2).

12. Indemnity

Indemnity for non-performance of this Charterparty, proved damages, not exceeding estimated amount of freight.

13. Agency

In every case the Owners shall appoint his own Broker or Agent both at the port of loading and the port of discharge.

14. Brokerage

A brokerage commission at the rate stated in Box 20 on the freight, [deadfreight and demurrage,] earned is due to the party mentioned in Box 20.

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* Text enclosed between bold brackets [ ] designates marginal typewritten notations.

In case of non-execution at least ½ of the brokerage on the estimated amount of freight and dead-freight to be paid by the Owners to the Brokers as indemnity for the latter's expenses and work in case of more voyages the amount of indemnity to be mutually agreed.

15. General Strike Clause

Neither Charterers nor Owners shall be responsible for the consequences of any strikes or lock-outs preventing or delaying the fulfillment of any obligations under this contract.

If there is a strike or lock-out affecting the loading of the cargo, or any part of it, when vessel is ready to proceed from her last port or at any time during the voyage to the port or ports of loading or after her arrival there, Captain or Owners may ask Charterers to declare, that they agree to reckon the laydays as if there were no strike or lock-out. Unless Charterers have given such declaration in writing (by telegram, if necessary) within 24 hours Owners shall have the option of cancelling this contract, if part cargo has already been loaded. Owners must proceed with same, (freight payable on loaded quantity only) having liberty to complete with other cargo on the way for their own account.

If there is a strike or lock-out affecting the discharge of the cargo on or after vessel's arrival at or off port of discharge and same has not been settled within 48 hours. Receivers shall have the option of keeping vessel waiting until such strike or lock-out is at an end against paying half demurrage after expiration of the time provided for discharging, or of ordering the vessel to a safe port where she can safely discharge without risk of being detained by strike or lock-out. Such orders to be given within 48 hours after Captain or Owners have given notice to Charterers of the strike or lock-out affecting the discharge. On delivery of the cargo at such port, all conditions of this Charterparty and of the Bill of Lading shall apply and

vessel shall receive the same freight as if she had discharged at the original port of destination, except that if the distance of the substituted port exceeds 100 nautical miles, the freight on the cargo delivered at the substituted port to be increased in proportion.

16. War Risks ("Voywar 1950")

(1) In these clauses "War Risks" shall include any blockade or any action which is announced as a blockade by any Government or by any belligerent or by any organized body, sabotage, piracy, and any actual or threatened war, hostilities, warlike operations, civil war, civil commotion, or revolution.

(2) If at any time before the Vessel commences loading, it appears that performance of the contract will subject the Vessel or her Master and crew or her cargo to war risks at any stage of the adventure, the Owners shall be entitled by letter or telegram dispatched to the Charterers, to cancel this Charter.

(3) The Master shall not be required to load cargo or to continue loading or to proceed on or to sign Bill(s) of Lading for any adventure on which or any port at which it appears that the Vessel, her Master and crew or her cargo will be subjected to war risks. In the event or the exercise by the Master of his right under this Clause after part or full cargo has been loaded, the Master shall be at liberty either to discharge such cargo at the loading port or to proceed therewith. In the latter case the Vessel shall have liberty to carry other cargo for Owners' benefit and accordingly to proceed to and load or discharge such other cargo at any other port or ports whatsoever, backwards or forwards, although in a contrary direction to or out of or beyond the ordinary route. In the event of the Master electing to proceed with part cargo under this Clause freight shall in any case be payable on the quantity delivered.

(4) If at the time the Master elects to proceed with part or full cargo under clause 3, or after the Vessel has left the loading port, or the last of the loading ports, if more than one. It appears that further performance of the contract will subject the Vessel, her Master and crew or her cargo, to war risks, the cargo shall be discharged, or if the discharge has been commenced shall be completed, at any safe port in vicinity of the port of discharge as may be ordered by the Charterers. If no such orders shall be received from the Charterers within 48 hours after the Owners have dispatched a request by telegram to the Charterers for the nomination of a substitute discharging port, the Owners shall be at liberty to discharge the cargo at any safe port which they may, in their discretion, decide on and such discharge shall be deemed to be due fulfillment of the contract of affreightment. In the event of cargo being discharged at any such other port, the Owners shall be entitled to freight as if the discharge has been effected at the port or ports named in the Bill(s) of Lading, from which the Vessel may have been ordered pursuant thereto.

(5) (a) The Vessel shall have liberty to comply with any directions or recommendations as to loading, departure, arrival, routes, ports of call, stoppages, destination, zones, waters, discharge, delivery or in any other wise whatsoever (including any direction or recommendation not to go to the port of destination or to delay proceeding thereto or to proceed to some other port) given by any Government or by any belligerent or by any organized body engaged in civil war, hostilities or warlike operations or by any person or body acting or purporting to act as or with the authority of any Government or belligerent or of any such organized body or by any committee or person having under the terms of the war risks insurance on the Vessel, the right to give any such directions or recommendations. If, by reason of or in compliance with any

such direction or recommendation, anything is done or is not done, such shall not be deemed a deviation.

(b) If, by reason of or in compliance with any such directions or recommendations, the Vessel does not proceed to the port or ports named in the Bill(s) of Lading or to which she may have been ordered pursuant thereto, the Vessel may proceed to any port as directed or recommended or to any safe port which the Owners in their discretion may decide on and there discharge the cargo. Such discharge shall be deemed to be due fulfillment of the contract of affreightment and the Owners shall be entitled to freight as if discharge had been effected at the port or ports named in the Bill(s) of Lading or to which the Vessel may have been ordered pursuant thereto.

(6) All extra expenses (including insurance costs) involved in discharging cargo at the loading port or in reaching or discharging the cargo at any port as provided in Clauses 4 and 5 (b) hereof shall be paid by the Charterers and/or cargo owners, and the Owners shall have a lien on the cargo for all moneys due under these Clauses.

17. General Ice Clause

Port of loading

(a) In the event of the loading port being inaccessible by reason of ice when vessel is ready to proceed her last port or at any time during the voyage or on vessel's arrival or in case frost sets in after vessel's arrival, the Captain for fear of being frozen in is at liberty to leave without cargo, and this Charter shall be null and void.

(b) If during loading the Captain, for fear of vessel being frozen in, deems it advisable to leave, he has liberty to do so with what cargo he has on board and to proceed to any other port or ports with option of completing cargo for Owners' benefit for any port or ports including port of discharge. Any part cargo thus loaded under this Charter

to be forwarded to destination at vessel's expense but against payment of freight, provided that no extra expenses be thereby caused to the Receivers, freight being paid on quantity delivered (in proportion of lumpsum), all other conditions as per Charter.

(c) In case of more than on loading port, and if one or more of the ports are closed by ice, the Captain or Owners to be at liberty either to load the part cargo at the open port and fill up elsewhere for their own account as under section (b) or to declare the Charter null and void unless Charterers agree to load full cargo at the open port.

(d) This Ice Clause not to apply in the Spring.

Port of Discharge

(a) Should ice (except in the Spring) prevent vessel from reaching port of discharge, Receivers shall have the option of keeping vessel waiting until the re-opening of navigation and paying demurrage, or of ordering the vessel to a safe and immediately accessible port where she can safely discharge without risk of detention by ice. Such orders to be given within 48 hours after Captain or Owners have given notice to Charterers of the impossibility of reaching port of destination.

(b) If during discharging the Captain for fear of vessel being frozen in deems it advisable to leave, he has liberty to do so with what cargo he has on board and to proceed to the nearest accessible port where she can safely discharge.

(c) On delivery of the cargo at such port, all conditions of the Bill of Lading shall apply and vessel shall receive the same freight as if she had discharged at the original port of destination, except that if the distance of the substituted port exceeds 100 nautical miles, the freight on the cargo delivered at the substituted port to be increased in proportion.

ARBITRATION DEMAND

MAY 9, 1993

TO: VIMAR SEGUROS Y REASEGUROS, S.A.
BACCHUS ASSOCIATES

FROM: M.H. MARITIMA, S.A.

RE: VIMAR SEGUROS Y REASEGUROS, S.A. AND BACCHUS ASSOCIATES V. M/V SKY REEFER, HERENGINES, ETC., IN REM AND M.H. MARITIMA, S.A., IN PERSONAM
C.A. NO. 91-1345-WF (D. MASS.)

WE, THE OWNERS OF M/V "SKY REEFER", HEREBY DEMAND THAT THE CARGO DAMAGE DISPUTE BE RESOLVED THROUGH TOKYO ARBITRATION AND THAT YOU TAKE STEPS TO COMMENCE ARBITRATION PROCEEDINGS IN TOKYO IN ACCORDANCE WITH THE TERMS OF THE RELEVANT BILL OF LADING.

REGARDS

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

C.A. No. 91-13345WF

Filed September 29, 1993

VIMAR SEGUROS Y REASEGUROS, S.A.
and BACCHUS ASSOCIATES

Plaintiffs,

—v.—

M/V SKY REEFER, her engines, etc., *in rem*, and M.H. MARITIMA, S.A., in personam

Defendants.

MOTION AND ORDER TO EXTEND TIME
FOR INTERLOCUTORY APPEAL

Plaintiffs Vimar Seguros y Reaseguros, S.A. and Bacchus Associates, in accordance with 28 U.S.C. § 1292 (b); on showing that the Clerk, due to clerical error or oversight, did not, until September 16, 1993, mail to counsel for the parties the Certification Order previously issued and entered on July 22, 1993, move for an Order granting an additional ten (10) days, from the date of entry of the instant Order, to petition the United States Court of Appeals for the First Circuit for leave to appeal from the Memorandum and Order issued on April 19, 1993.

WHEREFORE, it is ORDERED that plaintiffs, in accordance with 28 U.S.C. § 1292 (b), shall have ten (10) days from the date of entry of this Order, to petition the United States Court of Appeals for the First Circuit for leave to appeal from the Memorandum and Order issued on April 19, 1993.

Dated: September 30, 1993

[illegible]
United States District Judge

United States Court of Appeals

FOR THE FIRST CIRCUIT

93-8054

VIMAR SEGUROS Y REASEGUROS, S.A.
and BACCHUS ASSOCIATES,

Plaintiffs-Petitioners,

—v.—

M/V SKY REEFER, her engines, *etc.*
and M.H. MARITIMA, S.A.,

Defendants-Respondents.

PETITION FOR APPEAL PURSUANT TO 28 U.S.C. § 1292(b)
FROM AN INTERLOCUTORY ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

PETITION AND BRIEF OF PETITIONERS VIMAR AND BACCHUS

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Of Counsel:

STANLEY MCDERMOTT III

II.

The Question Appealed

Is an arbitration clause in a bill of lading that is subject *ex proprio vigore* to the United States Carriage of Goods Act ("Cogsa"), 46 U.S.C. § 1300 *et seq.*, and is thereby governed by United States law, enforceable, where (a) the arbitration clause is tied to an invalid foreign-law clause; (b) the site of the arbitration is a foreign country that has no connection with the making or the performance of the bill-of-lading contract and is otherwise the home forum of the ocean carrier; and (c) the bill-of-lading consignee did not negotiate or otherwise agree to the foreign arbitration clause.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 93-8054

VIMAR SEGUROS Y REASEGUROS, S.A.
and BACCHUS ASSOCIATES,

Plaintiffs, Petitioners,

—v.—

M/V SKY REEFER, HER ENGINES, ETC.,
and M.H. MARITIMA, S.A.,

Defendants, Respondents.

Before:

BREYER, *Chief Judge*,
TORRUELLA and SELYA, *Circuit Judges*.

ORDER OF COURT
Entered November 1, 1993

The petition for leave to appeal under 28 U.S.C. § 1292 (b) is granted.

By the Court:

FRANCIS P. SCIGLIANO, Clerk

By: _____
Chief Deputy Clerk

United States Court of Appeals

FOR THE FIRST CIRCUIT

No. 93-2179

VIMAR SEGUROS Y REASEGUROS, S.A.
and BACCHUS ASSOCIATES,

Plaintiffs-Appellants,

—v.—

M/V SKY REEFER, her engines, *etc.*, *in rem*, and M.H. MARITIMA, S.A., *in personam*,

Defendants-Appellees.

ON APPEAL FROM A JUDGMENT OF THE THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF OF THE PLAINTIFFS-APPELLANTS VIMAR AND BACCHUS

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Of Counsel:
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Counsel for Plaintiffs-Appellants

II.

Statement of the Issues Presented for Review

Is an arbitration clause in a bill of lading that is subject *ex proprio vigore* to the United States Carriage of Goods Act ("Cogsa"), 46 U.S.C. § 1300 *et seq.*, and is thereby governed by United States law, enforceable, where (a) the arbitration clause is tied to an invalid foreign-law clause; (b) the site of the arbitration is a foreign country that has no connection with the making or the performance of the bill-of-lading contract and is otherwise the home forum of the ocean carrier; and (c) the bill-of-lading consignee did not negotiate or otherwise agree to the foreign arbitration clause?

APPENDIX 2

INTERNATIONAL CONVENTION FOR THE UNIFICATION OF CERTAIN RULES OF LAW RELATING TO BILLS OF LADING

SIGNED AT BRUSSELS ON AUGUST 25, 1924

1568 THE French text of the Convention is the only authoritative version of it, though an English translation has been authorised by the bureau of the conference.[1] The text of both versions is set out below. The Convention was signed only on August 25, 1924, after the (British) Carriage of Goods by Sea Act 1924 had been passed (on August 1, 1924). That Act was based on earlier drafts of the Convention, and in particular on the draft agreed at Brussels in October 1922, as amended at Brussels in October 1923 (see the preamble to the Act[2]). That draft is here referred to as the draft (convention) of 1923. That draft omitted Art. 9 (the gold clause) of the Convention of 1924 and differed from it in other respects. The variations between these two documents are here noted unless they amount to no more than insignificant variations in language.[3]

Convention internationale pour l'Unification de certaines Règles en Matière de Connaissement, signée à Bruxelles, le 25 Août 1924.

[*Here are stated the heads of the States concerned (see British text, infra).*]

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1 Both versions appear in Treaty Series No. 17 (1931).

2 *Supra*, § 244

3 The draft of 1923 is not easily available and I am indebted to the Secretary of the British Maritime Law Association and Maitre Carlo Van den Bosch, an honorary secretary of the Comité Maritime International, and their Belgian staff, for obtaining information of its contents.

1569 Ayant reconnu l'utilité de fixer de commun accord certaines règles uniformes en matière de connaissement, ont décidé de conclure une Convention à cet effet et ont désigné, pour leurs Plénipotentiares, savoir:

[*Here follows a list of Plenipotentiaries.*]

Lesquels, à ce dûment autorisés, sont convenus de ce qui suit:

* * *

Bills of Lading, on this 15th day of November, 1924, hereby make the following Declarations by direction of my Government:

I declare that His Britannic Majesty's Government adopt the last reservation in the additional Protocol of the Bills of Lading Convention.

I further declare that my signature applies only to Great Britain and Northern Ireland, I reserve the right of each of the British Dominions, Colonies, Overseas Possessions, and Protectorates, and of each of the territories over which His Britannic Majesty exercises a mandate, to accede to this Convention under Article 13.

GEORGE GRAHAME.

His Britannic Majesty's Ambassador at Brussels.
Brussels, this 15th day of November, 1924.

1586 *Note annexée à la Lettre de Son Excellence M. l'Ambassadeur du Japon à M. le Ministre des Affaires Etrangères de Belgique, du 25 Août 1925.*

Ambassade Impériale du Japon.

AU moment de procéder à la signature de la Convention internationale pour l'unification de certaines règles en matière de connaissement, le soussigné, Plénipotentiaire du Japon, fait les réserves suivantes:

(*a*) *A l'article* 4:

Le Japon se réserve, jusqu'à nouvel ordre, l'acceptation des dispositions du (*a*) à l'alinéa 2 de l'article 4.

(*b*) Le Japon est d'avis que la Convention, dans sa totalité, ne s'applique pas au cabotage national: par conséquent, il n'y aurait pas lieu d'en faire l'objet de dispositions au Protocole. Toutefois, s'il n'en est pas ainsi, le Japon se réserve le droit de régler librement le cabotage national par sa propre législation.

M. ADATCI.

Bruxelles, le 25 *Août,* 1925.

(Translation)

International Convention for the Unification of certain Rules of Law relating to Bills of Lading, signed at Brussels on August 15, 1924

1587 THE President of the German Republic, the President of the Argentine Republic, His Majesty the King of the Belgians, the President of the Republic of Chile, the President of the Republic of Cuba, His Majesty the King of Denmark and Iceland, His Majesty the King of Spain, the Head of the Estonian State, the President of the United States of America, the President of the Republic of Finland, the President of the French Republic, His Majesty the King of the United Kingdom of

Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, His Most Serene Highness the Governor of the Kingdom of Hungary, His Majesty the King of Italy, His Majesty the Emperor of Japan, the President of the Latvian Republic, the President of the Republic of Mexico, His Majesty the King of Norway. Her Majesty the Queen of the Netherlands, the President of the Republic of Peru, the President of the Polish Republic, the President of the Portuguese Republic, His Majesty the King of Roumania, His Majesty the King of the Serbs, Croats and Slovenes, His Majesty the King of Sweden, and the President of the Republic of Uruguay.

Having recognized the utility of fixing by agreement certain uniform rules of law relating to bills of lading, have decided to conclude a convention with this object and have appointed the following plenipotentiaries:

[*Here follows the list of Plenipotentiaries.*]

Who, duly authorized thereto, have agreed as follows:

ARTICLE 1

1588 In this convention the following words are employed, with the meanings set out below:

(*a*) "Carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper.

(*b*) "Contract of Carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter-party from the moment at which such a bill of

lading or similar document of title regulates the relations between a carrier and a holder of the same.

(*c*) "Goods" includes goods, wares, merchandise, and articles of every kind whatsoever except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.

(*d*) "Ships" means any vessel used for the carriage of goods by sea.

(*e*) "Carriage of goods" covers the period from the time when the goods are loaded on to the time they are discharged from the ship.

ARTICLE 2

1589 Subject to the provisions of Article 6, under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods, shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth.

ARTICLE 3

1590 1. The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to—

(*a*) Make the ship seaworthy.

(*b*) Properly man, equip and supply the ship.

(*c*) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

2. Subject to the provisions of Article 4, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

3. After receiving the goods into his charge the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things—

(*a*) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.

(*b*) Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper.

(*c*) The apparent order and condition of the goods.

Provided that no carrier, master or agent of the carrier shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

1591 4. Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3 (*a*), (*b*) and (*c*).

5. The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity and weight, as furnished by him, and the shipper shall indemnify the carrier against

all loss, damages and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

6. Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or if the loss or damage be not apparent, within three days, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading.

The notice in writing need not be given if the state of the goods has, at the time of their receipt, been the subject of joint survey or inspection.

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered.

In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

1592 7. After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier, to the shipper shall, if the shipper so demands, be a "shipped" bill of lading, provided that if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the "shipped" bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the

goods have been shipped and the date or dates of shipment, and when so noted, *if it shows the particulars mentioned in paragraph* 3 *of Article* 3,[10] shall for the purpose of this article be deemed to constitute a "shipped" bill of lading.

8. Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault, or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in this convention, shall be null and void and of no effect. A benefit of insurance *in favour of the carrier*[10] or similar clause shall be deemed to be a clause relieving the carrier from liability.

ARTICLE 4

1593 1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article 3. Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article.

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

[10] No words corresponding to those in italics appear in the draft of 1923.

(*a*) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship.

(*b*) Fire, unless caused by the actual fault or privity of the carrier.

(*c*) Perils, dangers and accidents of the sea or other navigable waters.

(*d*) Act of God.

(*e*) Act of war.

(*f*) Act of public enemies.

(*g*) Arrest or restraint of princes, rulers or people, or seizure under legal process.

(*h*) Quarantine restrictions.

(*i*) Act or omission of the shipper or owner of the goods, his agent or representative.

(*j*) Strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general.

(*k*) Riots and civil commotions.

(*l*) Saving or attempting to save life or property at sea.

(*m*) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods.

(*n*) Insufficiency of packing.

(*o*) Insufficiency or inadequacy of marks.

(*p*) Latent defects not discoverable by due diligence.

(*q*) Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier,

but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

1594 3. The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants.

4. Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of this convention or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.

5. Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding £100 per package or unit, or the equivalent of that sum in other currency unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

This declaration if embodied in the bill of lading shall be prima facie evidence, but shall not be binding or conclusive on the carrier.

By agreement between the carrier, master or agent of the carrier and the shipper another maximum amount than that mentioned in this paragraph may be fixed, provided that such maximum shall not be less than the figure above named.[11]

[11] There follows in the draft of 1923 a provision by which (as translated into English): "The rate of exchange shall be taken as at the day of arrival of the ship at the port of discharge of the goods in question."

Neither the carrier nor the ship shall be responsible in any event for loss or damage to, or in connection with, goods if the nature or value thereof has been knowingly misstated by the shipper in the bill of lading.

6. Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place, or destroyed or rendered innocuous by the carrier without compensation[12] and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

ARTICLE 5

1595 A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and obligations under this convention, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper. The provisions of this convention shall not be applicable to charter parties, but if bills of lading are issued in the case of a ship under a charter party they shall comply with the terms of this convention. Nothing in these rules shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average.

[12] Here is inserted in the draft of 1923 "for the shipper" ("pour le chargeur").

ARTICLE 6

1596 Notwithstanding the provisions of the preceding articles, a carrier, master or agent of the carrier and a shipper shall in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness, so far as this stipulation is not contrary to public policy, or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care and discharge of the goods carried by sea, provided that in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a non-negotiable document and shall be marked as such.

Any agreement so entered into shall have full legal effect.

Provided that this article shall not apply to ordinary commercial shipments made in the ordinary course of trade, but only to other shipments where the character or condition of the property to be carried or the circumstances, terms and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement.

ARTICLE 7

1597 Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to, or in connection with, the custody and care and handling of goods prior to the loading on, and subsequent to, the discharge from the ship on which the goods are carried by sea.

ARTICLE 8

The provisions of this convention shall not affect the rights and obligations of the carrier under any statute for the time being in force relating to the limitation of the liability of owners of seagoing vessels.

ARTICLE 9[13]

The monetary units mentioned in this convention are to be taken to be gold value.

Those contracting States in which the pound sterling is not a monetary unit reserve to themselves the right of translating the sums indicated in this convention in terms of pound sterling into terms of their own monetary system in round figures.

The national laws may reserve to the debtor the right of discharging his debt in national currency according to the rate of exchange prevailing on the day of the arrival of the ship at the port of discharge of the goods concerned.

ARTICLE 10[14]

1598 The provisions of this convention shall apply to all bills of lading issued in any of the contracting States.

ARTICLE 11[15]

After an interval of not more than two years from the day on which the convention is signed the Belgian Government shall place itself in communication with the Governments of the high contracting parties which have declared themselves prepared to ratify the convention, with a view to deciding whether it shall be put into force. The ratifications shall be deposited at

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13 Article 9 is omitted from the draft of 1923.

14 Article 10 of the Convention appears as Art. 9 of the draft of 1923.

15 Article 11 *et seq.* do not appear in the draft of 1923.

Brussels at a date to be fixed by agreement among the said Governments.[16] The first deposit of ratifications shall be recorded in a *procès-verbal* signed by the representatives of the Powers which take part therein and by the Belgian minister for Foreign Affairs.

The subsequent deposit of ratifications shall be made by means of a written notification, addressed to the Belgian Government and accompanied by the instrument of ratification.

A duly certified copy of the *procès-verbal* relating to the first deposit of ratifications, of the notifications referred to in the previous paragraph, and also of the instruments of ratification accompanying them, shall be immediately sent by the Belgian Government through the diplomatic channel to the Powers who have signed this convention or who have acceded to it. In the cases contemplated in the preceding paragraph, the said Government shall inform them at the same time of the date on which it received the notification.

ARTICLE 12

1599 Non-signatory States may accede to the present convention whether or not they have been represented at the International Conference at Brussels.

A State which desires to accede shall notify its intention in writing to the Belgian Government, forwarding to it the document of accession, which shall be deposited in the archives of the said Government.

The Belgian Government shall immediately forward to all the States which have signed or acceded to the convention a duly certified copy of the notification and of the act of accession, mentioning the date on which it received the notification.

[16] Ratifications were deposited on June 2, 1930, by the United Kingdom (subject to the declaration made by the British Ambassador at Brussels on signing the Convention; *supra*, § 1585), Belgium (not including Belgian Congo or Ruanda-Urundi), Hungary and Spain.

ARTICLE 13

The high contracting parties may at the time of signature, ratification or accession declare that their acceptance of the present convention does not include any or all of the self-governing dominions, or of the colonies, overseas possessions, protectorates or territories under their sovereignty or authority, and they may subsequently accede separately on behalf of any self-governing dominion, colony, overseas possession, protectorate or territory excluded in their declaration. They may also denounce the convention separately in accordance with its provisions in respect of any self-governing dominion, or any colony, overseas possession, protectorate or territory under their sovereignty or authority.

ARTICLE 14

1600 The present convention shall take effect, in the case of the States which have taken part in the first deposit of ratifications, one year after the date of the protocol recording such deposit.[17] As respects the States which ratify subsequently or which accede, and also in cases in which the convention is subsequently put into effect in accordance with Article 13, it shall take effect six months after the notifications specified in paragraph 2 of Article 11 and paragraph 2 of Article 12 have been received by the Belgian Government.

ARTICLE 15

In the event of one of the contracting States wishing to denounce the present convention, the denunciation shall be notified in writing to the Belgian Government, which shall immediately communicate a duly certified copy of the notification to all the other States, informing them of the date on which it was received.

[17] Ratifications having first been deposited on June 2, 1930, the Convention took effect on June 2, 1931.

The denunciation shall only operate in respect of the State which made the notification, an on the expiry of one year after the notification has reached the Belgian Government.

ARTICLE 16

Any one of the contracting States shall have the right to call for a fresh conference with a view to considering possible amendments.

A State which would exercise this right should notify its intention to the other States through the Belgian Government, which would make arrangements for convening the Conference.

1601 Done at Brussels, in a single copy, the 25th August, 1924.

For Germany: KELLER.

For the Argentine Republic:

For Belgium: LOUIS FRANCK; ALBERT LE JEUNE; SOHR.

For Chile: ARMANDO QUEZADA.

For the Republic of Cuba:

For Denmark:

For Spain: EL MARQUES DE VILLALOBAR.

For Estonia: PUSTA.

For the United States of America: WILLIAM PHILLIPS.

For Finland:

For France: MAURICE HERBETTE.

For Great Britain: GEORGE GRAHAME.

For Hungary: WORACZICZKY.

For Italy: GIULIO DANEO.

For Japan: M. ADATCI.

Subject to the reservations in the note relating to this treaty and attached to my letter, dated 25th August 1925, to S. Exc. M. Emile Vandervelde, Minister for Foreign Affairs for Belgium.

For Lativia:

For Mexico:

For Norway:

For the Netherlands:

For Peru:

For Poland and the Free City of Danzig: SZEMBEK.

For Portugal:

For Roumania: HENRY CATARGI.

For the Kingdom of the Serbs, Croats and Slovenes: Dr. MILORAD STRAZNICKY; Dr. VERONA.

For Sweden:

For Uruguay:

Protocol of Signature

1602 AT the time of signing the International Convention for the Unification of certain Rules of Law relating to Bills of Lading the Plenipotentiaries whose signatures appear below have adopted this Protocol, which will have the same force and the same value as if its provisions were inserted in the text of the Convention to which it relates.

The High Contracting Parties may give effect to this convention either by giving it the force of law or by

including in their national legislation in a form appropriate to that legislation the rules adopted under this convention.

They may reserve the right—

1. To prescribe that in the cases referred to in paragraph 2 (*c*) to (*p*) of Article 4 the holder of a bill of lading shall be entitled to establish responsibility for loss or damage arising from the personal fault of the carrier or the fault of his servants which are not covered by paragraph (a).

2. To apply Article 6 in so far as the national coasting trade is concerned to all classes of goods without taking account of the restriction set out in the last paragraph of that article.

Done at Brussels, in a single copy, the 25th August, 1924.

For Germany: KELLER.

For the Argentine Republic:

For Belgium: LOUIS FRANCK; ALBERT LE JEUNE; SOHR.

For Chile: ARMANDO QUEZADA.

For the Republic of Cuba:

For Denmark:

For Spain: EL MARQUES DE VILLALOBAR.

For Estonia: PUSTA.

For the United States of America: WILLIAM PHILLIPS.

For Finland:

For France: MAURICE HERBETTE.

For Great Britain: GEORGE GRAHAME. (*Subject to Declaration printed in the French text, supra*, § 1585.)

For Hungary: WORACZICZKY.

For Italy: GIULIO DANEO.

For Japan:

For Lativia:

For Mexico:

For Norway:

For the Netherlands:

For Peru:

For Poland and the Free City of Danzig: SZEMBEK.

For Portugal:

For Roumania: HENRY CATARGI.

For the Kingdom of the Serbs, Croats and Slovenes: Dr. MILORAD STRAZNICKY; Dr. VERONA.

For Sweden:

For Uruguay:

[*For British note, see supra*, § 1585]

1603 *Note attached to the letter of August 25, 1925, from His Excellency the Japanese Ambassador to the Belgian Minister for Foreign Affairs.*

Imperial Embassy of Japan.

AT the time of signing the International Convention for the Unification of certain Rules of Law relating to Bills

of Lading the undersigned, Plenipotentiary of Japan, makes the following reservations:

(*a*) *To Article* 4:

Japan reserves, until further notice, acceptance of the provisions of (*a*) paragraph 2 of Article 4.

(*b*) Japan is of opinion that the Convention, as a whole, does not apply to the national coasting trade, and consequently there is no need to make it the object of a provision in the Protocol. At the same time, if this is not the case, Japan reserves the right to provide freely for the national coasting trade by its own legislation.

M. ADATCI.

Brussels, August 25, 1925.

VOLUME ◊ ◊

DOING BUSINESS IN JAPAN

Statute Volume

GENERAL EDITOR

Zentaro Kitagawa

PROFESSOR OF LAW
KYOTO UNIVERSITY
DIRECTOR OF KYOTO COMPARATIVE
LAW CENTER

1992

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Books

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by

MATTHEW BENDER & COMPANY

INCORPORATED

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Printed in United States of America
Library of Congress Catalogue Card Number: 80-68780

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11 PENN PLAZA, NEW YORK, NY 10001-2006 (212) 967-7707
2101 WEBSTER ST., OAKLAND, CA 94612-3027 (510) 446-7100

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APPENDIX 5D

The International Carriage of Goods by Sea Act

(Kokusai Kaijō Buppin Unsō Hō)

(Law No. 172, 1957)

Article 1. (Application)

This law shall apply to the carriage of goods by ship when either the port of loading or the port of discharge is outside this country.

Article 2. (Definitions)

1. In this law the term "ship" has the meaning provided in the Commercial Code Article 684, paragraph 1, but excludes those boats and small vessels described in Article 684, paragraph 2.

2. In this law the term "carrier" means a shipowner, a lessee of a ship, or a charterer carrying goods according to the previous Article.

3. In this law "consignor" means a consignor or charterer who commissions the carriage of goods according to the previous Article.

Article 3. (Duty of care regarding the goods carried)

1. The carrier is liable to pay damages when he or the persons employed by him for the receipt, loading, stowage, carriage, storage, unloading and delivery of the goods fail to take due care, thus causing loss, damage or delay to the goods carried.

2. The previous paragraph does not apply to damage caused by the acts of the master, crew, pilot, or other persons employed by the carrier in the navigation or management of the ship, or by fire on board the ship (unless due to negligence or intention of the carrier).

Article 4. (Duty of care regarding the goods carried)

1. Unless the carrier can prove that he took due care according to the previous Article, cannot avoid liability under that article.

2. Notwithstanding the previous paragraph, the carrier is exempt from liability under the preceding article if he proves that the damage to the goods carried arose from any of the following facts. However, if it is proved that the damage could have been avoided by the exercise of due care according to Article 3, and that such due care was not exercised, then this paragraph shall not apply.

1. Peril peculiar to the sea or other navigable waters.
2. Natural calamity or disaster.
3. War, riot, or civil war.
4. Piracy or other similar act.
5. Judicial attachment, quarantine restriction, or other disposal measure taken under public authority.
6. Act of the consignor or of the owner of the goods carried or of a person employed by one of them.
7. Strike, slow-down, lock-out or other similar dispute.
8. Attempt to save life or property at sea, or any deviation for that purpose, or any other deviation for fair and appropriate reason.
9. The particular nature of the goods carried or their latent defect.
10. Imperfect packaging or marking of the goods carried.
11. Latent defect in a derrick or similar equipment.

3. The previous paragraph does not preclude the application of Article 9.

Article 5. (Dull of care regarding fitness for the voyage)

1. The carrier is liable to pay damages when he or the persons employed by him fail to exercise due care as to the following at the time of departure, thus causing delay, loss, or damage to the goods carried:

1. to make the ship seaworthy;
2. to man and equip the ship and replenish supplies; or
3. to make the holds, refrigeration chambers and any other area used for the storage of the goods carried suitable for the reception and preservation of those goods.

2. Unless the carrier can prove that he took due care according to the preceding paragraph, he cannot avoid the liability provided for under that paragraph.

Article 6. (Duty to deliver a bill of lading)

1. The carrier, master or carrier's agent, at the request of the consignor, shall issue, without delay after the goods have been loaded, one or more bills of lading recording that the goods have been shipped ("hereafter referred to as a shipped bill of lading"). Also, as to goods delivered, the carrier after their receipt but before loading, shall at the request of the consignor issue one or more bills of lading, recording that the goods have been received (hereafter referred to as a "received bill of lading").

2. Where receipt bills of lading have been issued, the delivery of a shipped bill of lading cannot be demanded, except in exchange for all the issued received bills of lading.

Article 7. (Issuing a bill of lading)

1. The bill of lading must state the following particulars (in the case of a receipt bill of lading items 7 and 8 shall be excluded) and the carrier, master or the carrier's agent shall sign it or inscribe and affix his seal to it.

1. The kind of goods.
2. The weight or volume of the goods, or the number of packages or individual pieces and the marks of the goods.
3. The apparent condition of the goods.
4. The consignor's full name or trade name.
5. The consignee's full name or trade name.
6. The carrier's full name or trade name.
7. The name of the ship and its nationality.
8. The date and port of loading.
9. The port of discharge.
10. The freight.
11. When several bills of lading are issued, the number of bills issued.
12. The place and date of issuance.

2. Where the delivery of a shipped bill of lading has been demanded in exchange for the received bill of lading, that received bill of lading containing a statement that the goods have been loaded and which has been signed or inscribed and sealed may be substituted for a shipped bill of lading. In this case, the previous particulars described in numbers 7 and 8 shall be stated thereon.

Article 8. (Consignor's Notice)

1. The particulars described in paragraph 1, items 1 and 2 of the previous article must, in cases where a consignor has given written notice of those required particulars, be entered by the carrier, master or carrier's agent according to that notice.

2. The preceding paragraph shall not apply where the carrier with reasonable ground believes that the notice described

in that paragraph is not correct, or when there is no suitable method of confirming whether the notice is correct. That paragraph also shall not apply in cases where the goods carried or their cases or packages have no marks, or where the marks will not withstand the voyage.

3. The consignor shall guarantee to the carrier that the notice under paragraph 1 of this article is correct.

Article 9. (False entry on a bill of lading)

When an entry on the bill of lading is contrary to the actual facts, the carrier cannot set up the difference against a good faith holder of the bill of lading unless the carrier proves that he took due care when making that entry.

Article 10. (Provisions applied mutatis mutandis)

Articles 573 to 575, Article 584 and Articles 770 to 775 of the Commercial Code shall apply *mutatis mutandis* to a bill of lading under this law.

Article 11. (Disposal of dangerous cargo)

1. When the carrier, master, or carrier's agent does not know at the time of loading that the goods are inflammable, explosive, or of a similar dangerous nature, then those goods may at any time be unloaded, destroyed or rendered harmless.

2. The provisions of the preceding paragraph shall not preclude the carrier from demanding compensatory damages from the consignor.

3. When the carrier, the master or the carrier's agent knew at the time of loading that the goods were inflammable, explosive, or of a similar dangerous nature, those goods may be unloaded, destroyed or rendered harmless if they endanger the ship or other cargo.

4. The carrier having disposed of the goods according to paragraph one or the preceding paragraph is not liable to pay damages for the loss caused by such disposal.

Article 12. (Duty of the consignee, etc., to give notice)

1. When there is any partial loss of or partial damage to the goods carried, the consignee or the holder of the bill of lading must at the time of receipt give the carrier a written report of the general nature of the loss or damage. However, where the loss or damage is not immediately discoverable, it shall be sufficient to give the report within three days from the day of receipt.

2. When a report, as specified in the preceding paragraph, has not been given, it shall be presumed that the goods carried were delivered without loss or damage.

3. The preceding two paragraphs do not apply to cases where the actual condition of the goods carried is confirmed at the time of delivery in the presence of the parties concerned.

4. When there are doubts about the loss of or damage to the goods carried, the carrier, the consignor and the holder of the bill of lading must grant each other the necessary facilities for inspection of the goods.

Article 13. (Limitation of liability)

1. Concerning the goods carried, the carrier's liability per package or unit is limited to 100,000 yen.

2. The previous paragraph does not apply when notice as to the kind and value of the goods carried is given by the consignor at the time of entrusting them for shipment and the same is recorded on the bill of lading.

3. In the case provided for in the previous paragraph, when the consignor has intentionally reported a value significantly in excess of the real value of the goods carried, the carrier is not liable to pay any compensatory damages for those goods.

4. In the case provided for in paragraph 2, if the consignor has intentionally reported a value significantly below the real

value, the reported value shall be presumed to be the value of the goods carried with regard to damage to the goods carried.

5. The preceding two paragraphs shall not apply in cases where the carrier has acted in bad faith.

Article 14. (Limited period of liability)

The carrier's liability for the goods carried shall cease if court proceedings are not commenced within one year from the day the goods were delivered (where all the goods have been lost, then from the day when they should have been delivered). However, this shall not apply when the carrier has acted in bad faith.

Article 15. (Prohibition of special agreements)

1. Any special agreement unfavorable to the consignor, consignee or to the holder of the bill of lading and contrary to the provisions of Articles 3 to 5, Articles 8 and 9, and Articles 12 to 14, is void. The same shall apply to any contract purporting to transfer to the carrier rights arising from the insurance contracts for the goods carried and other similar contracts.

2. The provisions of the preceding paragraph shall not prevent the making of special agreements disadvantageous to the carrier. In such a case the consignor may require that the special agreement be entered on the bill of lading.

3. The provisions of paragraph 1 of this article shall not apply to damage which occurred before the goods carried were loaded or after they were discharged.

4. Where a special agreement as provided for in paragraph 1 has been made with regard to those damages described in the preceding paragraph, unless that special agreement has been entered on the bill of lading, the carrier cannot set it up against the holder of the bill of lading.

Article 16. (Exception to the prohibition of special agreements)

The provisions of paragraph one of the preceding article shall not apply where a contract of carriage is made having for its subject all or part of a ship. However, this shall not affect the relationship between the carrier and the holder of the bill of lading.

Article 17. (Ibid.)

The provisions of the preceding article shall apply *mutatis mutandis* to the carriage when the special nature or character of the goods carried or the special conditions under which the carriage is to be performed make it appropriate to exempt the carrier from liability or to reduce that liability.

Article 18. (Ibid.)

1. The provisions of Article 15, paragraph 1, shall not apply to the carriage of live animals or to the carriage of goods on deck.

2. When a special agreement as provided for in Article 15, paragraph 1, has been made as to the carriage referred to in the preceding paragraph, and when that special agreement has not been recorded on the bill of lading, the carrier cannot set up that special agreement against the holder of the bill of lading. The same shall apply to goods carried on deck when no statement to that effect is recorded on the bill of lading.

Article 19. (Preferential rights over the ship)

1. When a contract of carriage has for its subject all or part of a ship, and the charterer then makes a contract of carriage with a third person, a person having the right to claim compensation for damage to the goods carried occurring within the limits of the master's responsibility has a preferential right over the ship and its equipment.

2. The preferential right in the preceding paragraph shall be next to a preferential right under Article 842, item 8 of the Commercial Code.

3. The provisions of Article 844, paragraphs 2 and 3, Articles 845, 846, 847, paragraph 1 and Article 849 of the Commercial Code apply *mutatis mutandis* to the preferential right provided for in paragraph 1.

Article 20. (Application of the Commercial Code)

1. The Commercial Code, with the exception of Articles 738, 739, 759, and 766 to 776 inclusive, shall apply to carriage according to Article 1 of this law.

2. The provisions of Article 576 and 579 to 583, inclusive, of the Commercial Code shall apply *mutatis mutandis* to a carriage according to Article 1 of this law.

Article 21. (Exclusion of the carriage of mail)

This law shall not apply to the carriage of mail.

No. 94-623

Supreme Court, U.S.
FILED
JAN 12 1995
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

VIMAR SEGUROS Y REASEGUROS, S.A.,

Petitioner,

—v.—

M/V SKY REEFER, her Engines, etc., and M.H. MARITIMA, S.A.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONER'S BRIEF

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QUESTION PRESENTED

Whether a foreign arbitration clause in a maritime bill of lading is invalid under section 3(8) of the Carriage of Goods by Sea Act, 46 U.S.C. 1303(8).

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

In addition to petitioner Vimar Seguros y Reaseguros, Bacchus Associates was an appellant in the court of appeals. Vimar is wholly owned by Hercules Hispano, S.A.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 29 F.3d 727. The opinion of the district court on the merits (Pet. App. 14a-26a) is not officially reported but is available at 1993 WL 13743 (D. Mass. 1993), and its opinion certifying the legal issue for immediate appeal under 28 U.S.C. 1292(b) (Pet. App. 27a-30a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1994. A petition for a writ of certiorari was filed on October 5, 1994 and was granted on November 28, 1994. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 3(8) of the Carriage of Goods by Sea Act, 46 U.S.C. 1303(8), provides:

> Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect.

2. Section 2 of the Federal Arbitration Act, 9 U.S.C. 2, provides in pertinent part:

> A written provision in any maritime transaction * * * to settle by arbitration a controversy thereafter arising out of such contract * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT

A. Statutory Framework

1. Carriers' rights and obligations under COGSA

The Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. 1300 *et. seq.*, was enacted in 1936 "to define by law the rights and liabilities of water carriers and shippers in foreign commerce." See *Uniform Ocean Bills of Lading—Hague Rules*, H.R. Rep. No. 2218, 74th Cong., 2d Sess. 1 (1936). Modeled on the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (the "Hague Rules"), COGSA prescribes both the rights and responsibilities of common carriers (the companies that own and operate the ocean-going vessels that carry cargo for hire), and the rights and responsibilities of shippers and consignees (the companies that own the cargo shipped on board the carriers' vessels).

The statute establishes a carefully-crafted balance of rights and duties. On the one hand, COGSA imposes on the carrier the nondelegable obligation "to exercise due diligence to * * * [m]ake the ship seaworthy" before and at the beginning of the voyage (46 U.S.C. 1303(1)), and to "properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried" (46 U.S.C. 1303(2)). On the other hand, the statute immunizes the carrier from liability for losses resulting from numerous causes (46 U.S.C. 1304(2)(a) through (q)), including, for example, the "[a]ct, neglect or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship" (46 U.S.C. 1304(2)(a)), or "[f]ire, unless caused by the actual fault or privity of the carrier" (46 U.S.C. 1304(2)(b)). The statute also limits a carrier's liability to $500 per package or customary freight unit unless the cargo owner declares the value of the cargo in advance. 46 U.S.C. 1304(5).

2. The regulation of bills of lading under COGSA

COGSA also regulates "bills of lading"—the documents that evidence the transportation contract between the carrier and the cargo owner. A bill of lading is typically a single-page form document prepared by the carrier, which the carrier's agent issues to the shipper at the port of loading. See, *e.g.*, J.A. 46-56.[1] It acknowledges the carrier's receipt of the cargo for transportation to a designated port of discharge; it is the contract of carriage between the carrier and the shipper (and subsequent holders of the bill of lading); and it is often a negotiable (*i.e.*, transferable) document of title issued to order, which the shipper negotiates to its buyer incident to the sale of the goods. The buyer or its consignee returns the bill of lading to the carrier or its agents at the port of discharge and takes delivery of the goods from the carrier. The reverse side of the bill of lading typically contains numerous boilerplate terms imposed unilaterally by the carrier. J.A. 49-56.

By its terms, COGSA applies to "[e]very bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade * * *." 46 U.S.C. 1300. Because the bills of lading drafted by carriers had historically contained various clauses designed to insulate the carriers from any liability for cargo damage—in conflict with the goals of COGSA—the statute sought to make bills of lading simple and uniform,[2]

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[1] These pages comprise a single page document: J.A. 46-48 are the front side of the form bill of lading, and J.A. 49-56 are the reverse side of the form.

[2] As the House report explained:

> The uniformity and simplification of bills of lading will be of immense value to shippers who will be relieved of the necessity of closely examining all bills of lading to determine the exceptions contained therein to ascertain their rights and responsibilities; to underwriters who insure the cargo and are met with the same difficulties; and to bankers who extend credit upon the bills of lading.

Uniform Ocean Bills of Lading—Hague Rules, H.R. Rep. No. 2218, 74th Cong., 2d Sess. 7 (1936).

and—what is of particular importance here—it restricted a carrier's ability to avoid liability by inserting limiting conditions in the bill of lading. Section 3(8) of COGSA, 46 U.S.C. 1303(8), specifically invalidates any bill-of-lading clause that "relieve[s]" or "lessen[s]" the carrier's liability under COGSA:

> Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect.

B. The Present Controversy

1. Petitioner, a Spanish insurance company, is the subrogated cargo underwriter of Bacchus Associates, a New York partnership and a wholesale distributor of fruit in New England.[3] In February 1991, Bacchus contracted with a Moroccan supplier, Galaxie Negoce S.A. ("Galaxie"), to buy a shipload of Moroccan oranges, and chartered the M/V Sky Reefer, a refrigerated cargo ship, to transport the fruit from Morocco to New England. The Sky Reefer is owned by the respondent Maritima, a Panamanian corporation that is affiliated with certain Japanese shipping companies that chartered, operated, and managed the vessel.[4]

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[3] Petitioner issued to Bacchus a policy of marine cargo insurance that insured Bacchus against loss or damage to its goods. Bacchus submitted a claim for the damaged fruit in question to petitioner under that insurance policy and petitioner became subrogated to Bacchus' rights against respondents when it paid the major part of Bacchus' claim (in the sum of $733,442.90). J.A. 13 ¶ 9; 40 ¶ 10.

[4] Respondent Maritima, the vessel owner, initially time-chartered the Sky Reefer on a 3-year basis to Honma Senpaku Co., Ltd. of Tokyo (J.A. 57-62); Honma in turn chartered the vessel to Gyogyo Kaisha, Ltd. of Tokyo (*id.* at 63-68), which thereafter hired Nichiro Corporation to manage the vessel; and Nichiro Corporation in turn chartered the vessel to Bacchus for the voyage in question (*id.* at 69-81).

At the time the oranges were placed on board the Sky Reefer, local agents acting for the vessel's manager, Nichiro Corporation ("Nichiro"), a Japanese corporation based in Tokyo, issued a bill of lading to Galaxie, the shipper, stating that 2,058 pallets of oranges had been shipped on board the vessel from Agadir to New Bedford, Massachusetts. The bill of lading is a standard Nichiro form (J.A. 46-56), which became the contract of carriage between Bacchus and respondents when Galaxie negotiated the bill of lading to Bacchus. See 46 U.S.C. 1300, 1301(b) and 1312. Among the boilerplate provisions of the form bill of lading is a clause requiring that any dispute arising from the carriage of goods be arbitrated in Japan, pursuant to Japanese law (J.A. 49):

> 3. Governing Law and Arbitration
>
> (1) The contract evidenced by or contained in this Bill of Lading shall be governed by Japanese law.
>
> (2) Any dispute arising from this Bill of Lading shall be referred to arbitration in Tokyo by the Tokyo Maritime Arbitration Commission (TOMAC) of the Japan Shipping Exchange Inc., in accordance with the Rules of TOMAC and any amendments thereto, and the award by the arbitrators shall be final and binding on both parties.

Like the boilerplate terms in virtually all bills of lading, the Japanese law-and-arbitration clause was not the product of arm's length negotiations between Nichiro's local agents in Agadir and Galaxie, the Moroccan shipper.[5] Nichiro's agents simply signed and delivered the bill of lading to the shipper

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[5] See, *e.g.*, clause 2 of the bill of lading (J.A. 49 ¶ 2), stating that "[i]n accepting this Bill of Lading the Merchant [defined in clause 1 as including "the shipper, consignor, consignee, owner and receiver of the Goods and the holder of this Bill of Lading"] expressly accepts and agrees to all its terms, conditions, stipulations and exceptions whether written, typed, stamped or printed as fully as if signed by him."

once the cargo had been loaded on board the vessel. J.A. 41 ¶ 15.[6]

The vessel duly sailed from Agadir to New Bedford with the cargo. Only after the goods were en route did the shipper, Galaxie, tender the bill of lading to Bacchus, in accordance with the letter of credit opened in the shipper's favor. Bacchus first had notice of the Tokyo arbitration clause when it received the bill of lading from Galaxie. J.A. 41 ¶ 15.

By the time the ship arrived in New Bedford, the pallets of oranges had shifted in the cargo holds, crushing thousands of boxes of oranges, and resulting in a cargo loss in excess of $1 million. J.A. 40 ¶ 10. The apparent cause of the damage was the crew's failure to lash and brace the cargo sufficiently for a trans-Atlantic crossing in mid-winter. J.A. 39 ¶ 6.

2. On December 20, 1991, petitioner filed suit in the United States District Court for the District of Massachusetts, naming respondent Maritima *in personam* and respondent M/V Sky Reefer *in rem*.[7] Invoking the foreign arbitration clause in the bill of lading, respondents moved to stay the action pending arbitration in Japan. J.A. 36. Petitioner opposed the motion, contending that enforcement of the foreign arbitration clause would "lessen" the carrier's liability within the meaning of section 3(8) of COGSA.

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[6] Although the bill of lading purported to impose Japanese law and arbitration, its drafters recognized that COGSA might well apply nonetheless. The bill of lading stated (J.A. 56):

> **19. Local Clause**
>
> In case this Bill of Lading covers the Goods moving to or from the U.S.A. and it shall be adjudged that the Japanese law does not govern this Bill of Lading, then the provisions of the U.S. Carriage of Goods by Sea Act, 1936 shall govern before the Goods are loaded on and after they are discharged from the Vessel and throughout the entire time during which the Goods are in the actual custody of the Carrier.

[7] Bacchus was also a plaintiff in the litigation to recover its uninsured loss (approximately $250,000). See J.A. 11-14. For purposes of simplicity, we refer only to "petitioner."

The district court granted the motion (Pet. App. 14a-26a), holding that section 3(8) does not invalidate foreign arbitration clauses in maritime bills of lading. The court stated (*id.* at 18a) that section 3(8) must give way to the Federal Arbitration Act ("FAA"), which "specifically refers to bills of lading in defining types of agreements which might contain valid and irrevocable arbitration clauses." The court recognized (*id.* at 17a) that the Eleventh Circuit had reached the opposite conclusion in *State Establishment for Agricultural Product Trading v. M/V Wesermunde*, 838 F.2d 1576 (11th Cir.), *cert. denied*, 488 U.S. 916 (1988). In the court's view, however, the Eleventh Circuit had acted "without proper regard for the Supreme Court's mandate that lower courts discard their historical distrust of arbitrators, and give effect to private agreements to submit their disputes to private dispute resolution tribunals" (Pet. App. 18a).[8]

3. The court of appeals affirmed (Pet. App. 1a-13a). The court acknowledged (*id.* at 6a) that "§ 3(8) has been consistently used by federal courts to invalidate forum selection clauses in bills of lading governed by COGSA." It explained (*id.* at 9a), however, that the courts are "divided" on whether section 3(8) likewise invalidates foreign arbitration clauses. Explicitly rejecting (*id.* at 10a) the contrary decision of the Eleventh Circuit in *Wesermunde*, the court of appeals elected to "join those courts upholding the validity of foreign arbitration clauses in bills of lading subject to COGSA" (*ibid.*).

Significantly, the court of appeals "recognize[d] * * * that absent the FAA, COGSA might operate to nullify foreign arbitration clauses in bills of lading" (Pet. App. 10a n.5). The court surmised, however, that COGSA and the FAA were in "conflict" (*id.* at 11a), and it therefore applied "two canons of statutory interpretation" (*ibid.*) to resolve the conflict it per-

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[8] The district court thereafter certified the question for immediate appeal under 28 U.S.C. 1292(b) (Pet. App. 27a-30a). The court explained (*id.* at 28a) that the question whether foreign arbitration clauses violate COGSA "is a question as to which there is substantial ground for difference of opinion."

ceived. First, the court noted, "a later enacted statute generally limits the scope of an earlier statute if the two laws conflict"; under that principle, "the FAA must be given priority over COGSA in light of the FAA's reenactment in 1947, eleven years after COGSA was passed." *Id.* at 11a-12a. Second, the court stated, "where two statutes conflict, regardless of the priority of enactment, the specific statute ordinarily controls the general"; and under that principle, according to the court of appeals, the FAA again takes precedence, since it "specifically validates arbitration clauses contained in maritime bills of lading," whereas section 3(8) of COGSA "makes no reference to arbitration, or for that matter, forum selection clauses." *Id.* at 12a. In light of these statutory maxims—coupled with "the strong federal policy favoring arbitration" (*ibid.*)—the court held that "the FAA alone governs the validity of arbitration clauses, both foreign and domestic, and consequently removes them from the grasp of COGSA" (*id.* at 10a).

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress enacted section 3(8) of COGSA "[i]n anticipation of persistent efforts by carriers, who are the drafters of ocean bills of lading, to limit or eliminate their own duties and responsibilities under [COGSA] * * *." *Encyclopaedia Britannica, Inc. v. SS Hong Kong Producer*, 422 F.2d 7, 12 (2d Cir. 1969), *cert. denied*, 397 U.S. 964 (1970). The foreign arbitration clause is but the latest in a long line of bill-of-lading clauses having "the strong likelihood of not only lessening the liabilities of the carrier but also stripping the shipper of all the protection afforded it by COGSA." *Id.* at 13. Under the sweeping command of section 3(8) of COGSA—which forbids "any" clause that "relieves" or even "lessens" a carrier's COGSA liabilities—a foreign arbitration clause is "null and void and of no effect." And the court of appeals erred in supposing that section 2 of the Federal Arbitration Act

requires the enforcement of a foreign arbitration clause that is otherwise prohibited by COGSA.

A. 1. The text of section 3(8) is stark and emphatic: "*[a]ny* clause, covenant, or agreement in a contract of carriage *relieving* the carrier from liability * * * or *lessening* such liability * * * shall be *null* and *void* and of *no effect*." Nearly 100 years ago, this Court—construing a nearly identical precursor to COGSA—declared foreign *law* clauses in ocean bills of lading null and void. *Knott v. Botany Worsted Mills*, 179 U.S. 69 (1900). Following that lead, courts have unanimously held that section 3(8) of COGSA invalidates foreign *forum selection* clauses, which require the cargo owner to *sue* the carrier in a remote foreign country, often under color of foreign law. A foreign *arbitration* clause, "a specialized kind of forum-selection clause," *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974), is equally invalid and unenforceable under section 3(8) of COGSA, especially when (as here) coupled with a prohibited foreign law clause.

2. Foreign arbitration clauses also run afoul of the policies of COGSA. Congress enacted COGSA to "ensure uniformity in the basic rights and responsibilities arising out of bills of lading," *Mitsui & Co., Ltd. v. American Export Lines, Inc.*, 636 F.2d 807, 815 (2d Cir. 1981), in order to "enhance the currency and negotiability of ocean bills of lading," *Portland Fish Co. v. States Steamship Co.*, 510 F.2d 628, 632 (9th Cir. 1974), on the premise that "uniformity and simplification of bills of lading will be of immense value to shippers * * *; to underwriters * * *; and to bankers who extend credit upon the bills of lading." H.R. Rep. No. 2218, 74th Cong., 2d Sess. 7 (1936). A foreign arbitration clause frustrates those purposes by making the liabilities of ocean carriers substantially less uniform and far more uncertain.

B. The court of appeals acknowledged that "absent the FAA, COGSA might operate to nullify foreign arbitration clauses in bills of lading." Pet. App. 10a n.5. It concluded,

however, that COGSA and the FAA are in "conflict" and that "canons of statutory interpretation" were therefore required to decide between them. *Id.* at 11a. That was plainly mistaken. "The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). In our view, the two statutes are easily reconciled.

1. Certainly the *terms* of the statutes are compatible. Under the saving clause of section 2 of the FAA, arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." A bill-of-lading clause explicitly rendered "null and void" by section 3(8) of COGSA is necessarily revocable at law under section 2 of the FAA. In effect, the FAA does not remove foreign arbitration clauses in bills of lading "from the grasp of COGSA," as the court of appeals held (Pet. App. 10a); rather, COGSA, by virtue of the saving clause of section 2 of the FAA, removes foreign arbitration clauses "from the grasp" of the FAA.

2. The *policies* of the two statutes are reconcilable as well. Federal arbitration policy is implicated only when a party has voluntarily "agree[d] to arbitrate a statutory claim." *Mitsubishi Motors Corp v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). But a cargo owner virtually never "agrees" to the terms in a bill of lading, since they are invariably imposed, unilaterally, by the carrier. Moreover, federal arbitration policy has always taken account of competing federal statutory policies, and in this case the FAA can comfortably accommodate the policies of COGSA.

3. But even if the two statutes conflict, the court of appeals selected the wrong winner. COGSA, not the FAA, is the more specific statute. And COGSA therefore takes precedence even if the FAA were the later enacted statute—a postulate which itself is highly doubtful given the sharply limited purpose of the enactment of the FAA as positive law in 1947.

ARGUMENT

A FOREIGN ARBITRATION CLAUSE IN A MARITIME BILL OF LADING IS INVALID UNDER SECTION 3(8) OF THE CARRIAGE OF GOODS BY SEA ACT

A. Section 3(8) of COGSA Prohibits Foreign Arbitration Clauses in Maritime Bills of Lading

The indisputable premise of COGSA is that bills of lading for the carriage of goods by sea—drafted by ocean carriers to suit their exclusive interests—require special treatment under the law. For that reason, section 3(8) of COGSA invalidates any "clause, covenant or agreement" in a bill of lading that either "relieves" or "lessens" a carrier's COGSA liabilities. In light of that stark command, the courts have uniformly held that foreign *forum selection* clauses—which force cargo owners to litigate their claims in a foreign court, typically under color of foreign law—effectively lessen the carrier's COGSA liability and are therefore null and void under section 3(8).

A foreign *arbitration* clause, particularly when (as here) tied to a foreign law clause, has precisely the same prohibited purpose and effect. It forces the cargo owner, without consent, to present its claim at great and often prohibitive expense in a remote foreign jurisdiction, in arbitral proceedings not of its choosing, with no guarantee that the foreign arbitrators would apply controlling COGSA law. Foreign arbitration clauses also thwart the primary purpose of COGSA—to make bill-of-lading claims readily and uniformly enforceable—while at the same time depriving American cargo owners and insurers of their statutory right to enforce their cargo claims in the United States. Like foreign *forum selection* clauses, foreign *arbitration* clauses are therefore prohibited by section 3(8).

1. The terms of section 3(8) prohibit foreign arbitration clauses in bills of lading

a. Section 3(8) prohibits any bill-of-lading clause that effectively "relieves" or "lessens" a carrier's liability under COGSA

COGSA prescribes a detailed set of rights and responsibilities for carriers engaged in foreign maritime transactions with the United States.[9] And by its terms, COGSA brooks no exceptions: its rules apply to "[e]very bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, * * *." (46 U.S.C. 1300). See also (46 U.S.C. 1312) (emphasis added) ("[t]his chapter shall apply to *all* contracts for carriage of goods by sea to or from ports of the United States in foreign trade").

To ensure that carriers do not circumvent COGSA rules by inserting inconsistent terms in bills of lading, section 3(8) of COGSA provides (emphasis added):

> *Any* clause, covenant, or agreement in a contract of carriage *relieving* the carrier or the ship *from liability* for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or *lessening such liability* otherwise than as provided in this chapter, *shall* be *null and void and of no effect*.

[9] The balance is carefully struck: On the one hand, COGSA imposes on the carrier the nondelegable obligation "to exercise due diligence to * * * [m]ake the ship seaworthy" before and at the beginning of the voyage (46 U.S.C. 1303(1)), and to "properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried" (46 U.S.C. 1303(2)). On the other hand, the statute immunizes the carrier from liability for losses resulting from numerous causes (46 U.S.C. 1304(2)(a) through (q)), including, for example, the "[a]ct, neglect or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship" (46 U.S.C. 1304(2)(a)), or "[f]ire, unless caused by the actual fault or privity of the carrier" (46 U.S.C. 1304(2)(b)).

Section 3(8) sweeps broadly, prohibiting "any" clause in a "contract of carriage" that either "reliev[es]" or merely "lessen[s]" a carrier's liability under COGSA. The words are deliberately expansive: To "lessen" liability, as one authority notes, is to make it "less in size, quantity, scope, amount, etc." *The Oxford English Dictionary* (1971). And such breadth is necessary, because ocean carriers are constantly inventing "new and ingenious device[s] * * * [to strip] the shipper of all the protection afforded it by COGSA." *Encyclopaedia Britannica, Inc. v. SS Hong Kong Producer*, 422 F.2d 7, 13 (2d Cir. 1969), *cert. denied*, 397 U.S. 964 (1970). The courts have therefore construed the terms of section 3(8) liberally, to forbid any bill-of-lading clause whose practical effect would lessen the carrier's liability under COGSA—including by displacing (or threatening to displace) the application of COGSA rules.

This Court adopted exactly that view in *Knott v. Botany Worsted Mills*, 179 U.S. 69 (1900), construing section 1 of the Harter Act, 46 U.S.C. 190, a nearly identical precursor to section 3(8) of COGSA. Like section 3(8), section 1 of the Harter Act prohibited any bill-of-lading clause that "relieved" a carrier of certain liabilities.[10] The question in *Knott* was whether section 1 of the Harter Act prohibited a clause requiring that contractual disputes be resolved under "the law of the ship's flag"—in that case, England. The Court held that section 1 prohibited the clause. As the Court put it: "This express

[10] 46 U.S.C. 190 provides in pertinent part as follows:

> It shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be *relieved* from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be *null and void and of no effect*. Act of Feb. 13, 1893, c. 105 § 1, 27 Stat. 445. (Emphasis added.)

provision of the act of Congress overrides and nullifies the stipulations of the bill of lading that * * * the contract shall be governed by the law of the ship's flag." 179 U.S. at 77.

b. Courts uniformly strike down foreign *forum selection* clauses because they relieve or lessen carrier liability

Consistent with *Knott*, the lower federal courts have routinely invalidated bill-of-lading terms whose practical effect, if sustained, would lessen a carrier's liability under COGSA. Until very recently—when carriers have begun to impose foreign *arbitration* clauses—their most common tactic was to insert foreign *forum selection* clauses in bills of lading.[11] Applying section 3(8) of COGSA, the courts of appeals have uniformly struck down such provisions.[12]

[11] But carriers have resorted to many other devices as well. In *Encyclopaedia Britannica, Inc. v. SS Hong Kong Producer*, 422 F.2d 7 (2d Cir. 1969), *cert. denied*, 397 U.S. 964 (1970), for example, the Second Circuit, guided in part by this Court's decision in *United States v. Atlantic Mut. Ins. Co.*, 343 U.S. 236 (1952) (invalidating both-to-blame clause in carriers' bills of lading), rejected a bill-of-lading clause that purported to reduce the carrier's liability for goods stowed above deck. The court explained that this clause, "[i]n spite of the clear intent and purpose of COGSA" (422 F.2d at 12), was merely the latest "new and ingenious device which carries with it the strong likelihood of not only lessening the liabilities of the carrier but also stripping the shipper of all the protection afforded it by COGSA." *Id.* at 13. And the court cautioned that while that particular clause was not yet "common or widespread in bills of lading," inevitably "it would speedily be adopted, if it were held to be valid, because of the enormous advantage it gives the carriers" (*id.* at 13 n.3).

[12] See *Hughes Drilling Fluids v. M/V Luo Fu Shan*, 852 F.2d 840 (5th Cir. 1988) (invalidating bill-of-lading clause requiring suit against Chinese carrier in China), *cert. denied*, 489 U.S. 1033 (1989); *Conklin & Garrett, Ltd. v. M/V Finnrose*, 826 F.2d 1441, 1142-1144 (5th Cir. 1987) (invalidating bill-of-lading clause requiring suit against Finnish carrier in Finland under Finnish law); *Union Ins. Soc. of Canton, Ltd. v. S.S. Elikon*, 642 F.2d 721, 723-725 (4th Cir. 1981) (invalidating bill-of-lading clause requiring suit against German carrier in Germany under German law); *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200 (2d Cir. 1967) (invalidating bill-of-lading clause requiring suit against Norwegian carrier in Norway); *Underwriters at Lloyd's of London v. M/V Steir*, 773 F. Supp. 523 (D.P.R. 1991) (invalidating bill-of-lading clause requiring suit against French carrier in France); *C.A Seguros Orinoco v. Naviera Transpapel, C.A.*, 677 F. Supp. 675 (D.P.R. 1988) (invalidating bill-of-lading clause requiring suit against Venezuelan carrier in Venezuela); *Mitsui & Co., Ltd. v. M/V Glory River*, 464 F. Supp. 1004 (W.D. Wash. 1978) (invalidating bill-of-lading clause requiring suit against Japanese carrier in Tokyo under Japanese law); *Northern Assurance Co., Ltd. v. M/V Caspian Career*, 1977 A.M.C. 421 (N.D. Cal. 1977) (invalidating bill-of-lading clause requiring suit against Japanese carrier in Tokyo under Japanese law); *M.G. Chem Corp. v. M/V Sun Castor*, 1978 A.M.C. 1756 (D. Alaska 1977) (invalidating bill-of-lading clause requiring suit against Japanese carrier in Tokyo).

Judge Friendly's opinion for the en banc court in *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200 (2d Cir. 1967)—invalidating a Norwegian forum selection clause in a Norwegian carrier's bill of lading—is the leading decision. Relying on this Court's decision in *Knott*, Judge Friendly explained that "[f]rom a practical standpoint, to require an American plaintiff to assert his claim only in a distant court *lessens the liability* of a carrier *quite substantially*, particularly when the claim is small." *Id.* at 203 (emphasis added). A foreign suit clause puts " 'a high hurdle' " in the way of enforcing liability (quoting G. Gilmore & C. Black, *The Law of Admiralty* 125 n.3 (1957)), and "would almost certainly lessen liability if the law which the court would apply was neither [COGSA] nor the Hague Rules." *Ibid.* And even if the foreign court applied "one or the other of these regimes, requiring trial abroad *might* lessen the carrier's liability since there could be no assurance that it would apply them in the same way as would an American tribunal subject to the uniform control of the Supreme Court, and § 3(8) can well be read as covering a potential and not simply a demonstrable lessening of liability," *id.* at 203-04 (emphasis in the original). As Judge Friendly summarized the point: "Congress meant," by section 3(8), "to invalidate any contractual provision in a bill of lading for a shipment to or from the United States that would

prevent cargo able to obtain jurisdiction over a carrier in an American court from having that court entertain the suit and apply the substantive rules Congress has prescribed." *Id.* at 204. Accord, *Union Ins. Soc. of Canton, Ltd. v. S.S. Elikon*, 642 F.2d 721, 724 (4th Cir. 1981) ("enforcement of foreign forum selection clauses could lead to the recrudescence of bills of lading that would effectively frustrate shippers' ability to recover damages from negligent carriers"); *Conklin & Garrett Ltd. v. M/V Finnrose*, 826 F.2d 1441, 1444 (5th Cir. 1987) ("[i]t is *entirely unrealistic* to look to an obligation to sue overseas as not 'lessening' the liability of the carrier") (emphasis added).[13]

The lesson of the case law is clear: a bill-of-lading clause that threatens to displace the application of COGSA rules thereby "lessens" a carrier's liability for purposes of section 3(8). As a leading commentator puts it:

> [I]t is hard to see how it can be looked on as other than a "lessening" of the carrier's liability under COGSA to remit the bill of lading holder to a distant foreign court. It is quite true that the difficulty imposed would vary with circumstances; Canada is not Pakistan. But there is always some palpable "lessening," for if the choice-of-forum clause is ever enforced, the result must be to dismiss the litigant out of the United States court he has chosen to sue in. On most moderate-sized claims, remission to the foreign forum is a practical immunization of the carrier from liability.

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[13] See also *The Morviken*, [1983] 1 Lloyd's Law Rep. 1, 6-7 (applying article III, rule 8 of the Hague-Visby Rules, the counterpart of Section 3(8) of COGSA, to invalidate a Dutch law-and-forum clause; rejecting the contention that the "choice of forum clause" prescribed only "the procedure by which disputes under the contract of carriage are to be resolved;" and holding that such a view "would leave it open to any shipowner to evade the provisions of art. III, r. 8 by the simple device of inserting in his bills of lading * * * a clause in standard form providing as the exclusive forum for resolution of disputes what might aptly be described as a Court of convenience").

Charles L. Black, Jr., *The Bremen, COGSA and the Problem of Conflicting Interpretation*, 6 Vand. J. Trans. L. 365, 368-369 (1973).

c. A foreign *arbitration* clause, a type of forum selection clause, effectively lessens or even relieves COGSA liability and is therefore invalid under section 3(8)

1. A foreign arbitration clause—no less than a foreign forum selection clause—effectively "lessens" COGSA liability and is invalid under section 3(8) for exactly the same reasons. Like the foreign forum selection clause, a foreign arbitration clause, "a specialized kind of forum-selection clause," *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974), forces the cargo owner to prove its claim, at appreciably greater (and often prohibitive) expense, in a foreign jurisdiction that is deliberately remote from the relevant evidence and witnesses. It requires the cargo owner, provided it can marshal abroad the evidence and testimony otherwise at hand in the United States, to make its claim intelligible to foreign arbitrators, under foreign arbitral procedures not of its choosing. Such handicaps, "[f]rom a practical standpoint," also "lessen [ ] the liability of the carrier quite substantially" (*Indussa*, 377 F.2d at 203), and impose an equally " 'high hurdle' " in the way of enforcing the carrier's liability (*ibid.*).

The present case illustrates the point. Virtually all the evidence and most of the witnesses—including the terminal operators who took delivery of the damaged cargo, the several surveyors who examined it, the processors who reconditioned it, and the adjusters who approved payment of the claim—are located in the Northeastern United States (see J.A. 39-41 ¶¶ 6-14). Under the ruling below, petitioner would nevertheless be required, at great expense, to present that evidence and testimony (the witnesses permitting) in Tokyo, in a manner persuasive to Japanese arbitrators, under arbitral procedures chosen solely by respondents. The foreign arbitration clause,

therefore, has the undoubted practical effect of deterring cargo-damage claims both large and small, by attaching substantial evidentiary risks and prohibitive costs to the enforcement of such claims. Moreover, the commercial pressure on claimants to end a costly, unpredictable overseas arbitration by discounting and settling even the largest and strongest claims would be unrelenting. By any realistic measure, such calculated immunization from claims is a prohibited "lessening" of the carrier's liability.

But more than burdensome transaction costs and evidentiary risks are at stake: as this Court has observed, "the designation of arbitration in a certain place" commonly entails "selecting the law of that place to apply to that transaction." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 n.13 (1974). In that event, to paraphrase *Indussa*, a foreign arbitration clause "would almost certainly lessen liability if the law which the [arbitrators] would apply was neither [COGSA] nor the Hague Rules." 377 F.2d at 203. Indeed, even if the foreign arbitrators applied COGSA, requiring arbitration abroad "*might* lessen the carrier's liability since there could be no assurance that [the arbitrators] would apply them in the same way as would an American tribunal subject to the uniform control of the Supreme Court." *Id.* at 203-04 (emphasis in the original).[14] The prohibited risk that COGSA rights would not be enforced abroad would be no less real if a claim were submitted to foreign arbitrators as opposed to foreign judges.

For precisely those reasons, the Eleventh Circuit, in *State Establishment for Agricultural Product Trading v. M/V Weser-*

[14] In a footnote in the *Indussa* opinion, the court noted in *dicta* that its ruling "does not touch the question of arbitration clauses in bills of lading which require this to be held abroad," 377 F.2d at 204, n.4, but that "[i]f there be any inconsistency between the [FAA and COGSA], presumably the Arbitration Act would prevail by virtue of its reenactment as positive law in 1947" (*ibid.*). As explained at 25-33 *infra*, however, the FAA and COGSA are not inconsistent. The enactment of the FAA as positive law in 1947 also does not give the FAA, which was first enacted in 1925, any substantive priority over COGSA (see 37-38 *infra*).

munde, 838 F.2d 1576 (11th Cir.), *cert. denied*, 488 U.S. 916 (1988), held that section 3(8) of COGSA invalidates foreign *arbitration* clauses, just as it does foreign *suit* clauses.[15] The court explained that COGSA was "intended to reduce uncertainty concerning the responsibilities and liabilities of carriers, the responsibilities and rights of shippers, and the liabilities of underwriters who insure waterborne cargo." 838 F.2d at 1580. "By strictly circumscribing the ability of carriers to avoid liability on cargoes in their care, COGSA also greatly enhances the negotiability of bills of lading." *Ibid.* Toward that end, the court pointed out, COGSA "void[s] overreaching clauses inserted by carriers in their bills of lading that unreasonably limit the carrier's liability or obstructs the freight claimant's ability to secure redress." *Ibid.* Thus, the court noted, foreign suit clauses have been uniformly rejected under COGSA "because such provisions, as a practical matter, tend to lessen the liability of the carrier, particularly where the claim is small." *Id.* at 1580-1581.

The court in *Wesermunde* held that COGSA likewise invalidates foreign *arbitration* clauses in ocean bills of lading. To be sure, the court noted, arbitration as such does not violate COGSA, "in light of Congress' encouragement of arbitration by its enactment of the Arbitration Act, 9 U.S.C. §§ 1-14 (1970) * * *." 838 F.2d at 1581. The court held, however, with the FAA firmly in mind, that "a provision requiring arbitration in a *foreign* country that has no connection with either the performance of the bill of lading contract or the making of the bill of lading contract is a provision that would conflict with COGSA's general purpose of not allowing carriers to lessen their risk of liability." *Ibid.* (emphasis in the original).

2. Because they impose substantial costs on shippers, and threaten to displace the application of COGSA liability rules,

[15] Accord, *Organes Enter., Inc. v. M/V Khalij Frost*, No. 88 Civ. 4710, 1989 WL 37660 (S.D.N.Y. April 12, 1989); *Siderius, Inc. v. M.V. Ida Prima*, 613 F. Supp. 916 (S.D.N.Y. 1985); *Pacific Lumber & Shipper Co., Inc. v. Star Shipping A/S*, 464 F. Supp. 1314 (W.D. Wash. 1979).

foreign arbitration clauses are invariably impermissible under section 3(8) of COGSA.[16] But at the very least, foreign arbitration clauses are plainly invalid when they are coupled with a provision requiring the application of foreign substantive law. In that event, enforcing the arbitration provision is tantamount to abrogating COGSA liability rules—in flat contravention of the stark command of the statute. See 46 U.S.C. 1312 (emphasis added) ("[t]his chapter shall apply to *all* contracts for carriage for of goods to or from ports of the United States in foreign trade"). As this Court recognized in *Knott*, a bill-of-lading clause requiring the application of foreign law cannot be squared with the plain language of the statute. And as the Court flatly stated in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985), "in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies * * *, we would have little hesitation in condemning the agreement as against public policy."[17]

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16 In addition to their other infirmities, foreign arbitration clauses pose severe difficulties for cargo owners who believe that their COGSA rights have been abridged by a foreign arbitrator. It is exceedingly difficult for parties to vacate arbitration awards issued in the United States, and it would be even more difficult in the case of awards issued abroad. "Courts are generally prohibited from vacating an arbitration award on the basis of errors of law or interpretation," and "the express terms of 9 U.S.C. §§ 10 and 11 have often been deemed the exclusive grounds for vacation or modification." *Ainsworth v. Skurnick*, 960 F.2d 939, 940 (11th Cir. 1992). Based on *Wilko v. Swann*, 346 U.S. 427, 436-37 (1953), some courts recognize a "judicially-created" "manifest disregard of the law" standard for vacating arbitration awards, but "the bounds of this ground have never been defined, it clearly means more than error or misunderstanding with respect to the law," and "the term 'disregard' implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it," *Merrill, Lynch, Pierce, Fenner & Smith v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986), an abuse which is often impossible to prove. *Advest, Inc. v. McCarthy*, 914 F.2d 6, 10 (1st Cir. 1990).

17 Accord, Charles L. Black Jr., *The Bremen, COGSA and the Problem of Conflicting Interpretation*, 6 Vand. J. Trans. L. 365, 366 (1973) ("[a] stipulation for foreign law must have the effect of lessening carrier liability, or it is valueless to the carrier who inserted it, and the denial of its benefits does no harm to him").

That is precisely petitioner's position in this case. The bill of lading not only requires arbitration in Japan; it also states that "[t]he contract evidenced by or contained in this Bill of Lading shall be governed by Japanese law."[18] In particular, according to respondent's own expert (J.A. 44 ¶ 7), the arbitration proceedings in Japan would be governed by the Japanese Hague Rules, which would have severe consequences for petitioner: unlike COGSA, which, by judicial construction, imposes on the carrier a *non-delegable* obligation to load and stow the cargo properly (46 U.S.C. 1303(2)), *e.g.*, *Assoc. Metals & Minerals Corp. v. M/V Artkis Sky*, 978 F.2d 47, 50 (2d Cir. 1992); *Nichimen Co. v. M/V Farland*, 462 F.2d 319, 330 (2d Cir. 1972), the comparable provision in the Japanese Hague Rules purports to impose the duty to load and stow the cargo only on the carrier and "the persons employed by him" (J.A. 112) (Article 3(1))—and thus would appear not to cover this case, in which the stevedores who loaded and stowed the boxes of oranges in Morocco were hired by the shipper.[19] COGSA forbids that outcome. Because a foreign

18 To be sure, the Nichiro bill of lading provides that COGSA rules will be applied if "it shall be adjudged that the Japanese law does not govern this Bill of Lading * * *" (J.A. 56 ¶ 19). But there is no *judgment* that Japanese law "does not govern this Bill of Lading." The arbitrators would thus be free, by the terms of the bill of lading, to apply Japanese law, and respondents' Japanese law expert concedes they would do so. See J.A. 44 ¶ 7 (affidavit of Seiichi Nakamura).

19 See Note, *A COGSA Carrier's Duty to Load and Stow Cargo Is Nondelegable, Or Is it?: Associated Metals & Minerals Corp. v. M/V Artkis Sky*, 18 Tul. Mar. L. J. 125 (1993). Such disparity in the law among nations—even where that law is grounded in an international convention such as the Hague Rules—is unavoidable. "It remains lamentable that there should be so much advantage in choice of law or choice of forum, after the long efforts toward 'unification' represented by COGSA. Leaving aside minor textual differences among the Acts of the different nations, the trouble is that the technique for producing uniformity in the

arbitration clause—particularly (but not only) a clause that is coupled with a foreign law provision—"lessens" a carrier's liability under COGSA, it is forbidden by section 3(8).

2. Foreign arbitration clauses cannot be squared with the purposes of COGSA—to promote uniformity and certainty, and thus the negotiability, of maritime bills of lading

COGSA "was intended to reduce uncertainty concerning the responsibilities and liabilities of carriers, the responsibilities and rights of shippers and the liabilities of underwriters who insure waterborne cargo." *Union Ins. Soc. of Canton, Ltd. v. S.S. Elikon*, 642 F.2d 721, 723 (4th Cir. 1981). "The most outstanding benefits [of COGSA] are simplification and uniformity of bills of lading, * * * and denial to the carrier of power to exempt itself from various classes of liability by riders and exempting clauses in bills of lading at present so numerous and so technical as to create confusion and to occasion untold litigation." *Uniform Ocean Bills of Lading—Hague Rules*, H.R. Rep. No. 2218, 74th Cong., 2d Sess. 6-7 (1936). Such "uniformity and simplification," Congress concluded, "will be of immense value to shippers who will be relieved of the necessity of examining all bills of lading to determine the exceptions contained therein to ascertain their rights and responsibilities; to underwriters who insure the cargo and are met with the same difficulties; and to bankers who extend credit upon the bills of lading." *Id.* at 7.[20]

world's bill of lading law—the technique of procuring agreement on a text—is fatally defective; a text must be interpreted, and interpretations will surely diverge. No one can read the American COGSA cases—on deviation, on the Both-to-Blame Clause, on the definition of a 'package' and so on—without becoming aware that only direct Providential guiding of the judicial hand could produce uniformity of interpretation among Israel, Barbados, Belgium and Egypt." Charles L. Black, Jr., *The Bremen, COGSA and the Problem of Conflicting Interpretation*, 6 Vand. J. Trans. L. 365, 369 (1973).

[20] "The history of COGSA leaves no room for doubt" that one of the "dominant objectives of Congress" was "to ensure uniformity in the

Congress achieved the desired simplification and uniformity by requiring the application of COGSA liability rules to "all" bills of lading for goods carried to or from the United States. 46 U.S.C. 1300, 1312. By dint of COGSA, the carrier's liability is governed largely by statute, not by contract. As a result, cargo owners and their insurers no longer have to "examin[e] [the] bills of lading to * * * ascertain [the carrier's] rights and responsibilities." *Id.* at 7. And section 3(8) guarantees the integrity of the statutory allocation of rights and liabilities by nullifying any contractual clause, covenant, or agreement that purports to relieve the carrier of the liability imposed by COGSA—or which has the equally prohibited practical effect of lessening that liability.

Furthermore, "[b]y strictly circumscribing the ability of carriers to avoid liability on cargoes in their care, COGSA also greatly enhance[s] the negotiability of bills of lading." *Union Ins. Soc. of Canton*, 642 F.2d 721, 723 (4th Cir. 1981). And while " 'COGSA allows a freedom of contracting out of its terms,' " it does so " 'only in the direction of increasing the shipowner's liability, and never in the direction of diminishing them. This apparent onesidedness is a commonsense recognition of the inequality in bargaining power which * * * COGSA [was] designed to redress * * *.' " *Conklin & Garrett, Ltd. v. M/V Finnrose*, 826 F.2d 1441, 1443-1444 (5th Cir. 1987) (quoting G. Gilmore & C. Black, *The Law of Admiralty* 146 (1975)).

Foreign arbitration clauses, no less than foreign forum selection clauses, undermine the congressional design. The fundamental premise of COGSA is that bills of lading should

basic rights and responsibilities arising out of bills of lading * * *." *Mitsui & Co. Ltd. v. American Export Lines, Inc.*, 636 F.2d 807, 815 (2d Cir. 1981). In addition to "effectuating a standard and uniform set of provisions for ocean bills of lading," Congress enacted section 3(8) expressly "[i]n anticipation of persistent efforts by carriers, who are the drafters of ocean bills of lading, to limit or eliminate their own duties and responsibilities under [COGSA]." *Encyclopaedia Britannica, Inc.*, 422 F.2d at 11-12.

be easily, and predictably, enforceable. See *Union Ins. Soc. of Canton*, 642 F.2d 721, 723-725 (4th Cir. 1981). Central to such enforceability is the availability of a convenient forum in which a single body of law will be recognized and applied. By governing *all* contracts of carriage for goods touching United States ports, COGSA enables businessmen engaged in the foreign commerce of the United States to buy and sell goods confident that their COGSA rights will not be infringed by bill-of-lading terms that lessen those rights—including terms that require foreign arbitration, typically (as here) under foreign law.

But no cargo owner, underwriter or banker faced with a foreign arbitration clause can readily ascertain its rights or the carrier's legal liability. Nor can such parties reasonably predict how the carrier's liability would be enforced by foreign arbitrators in the carrier's home jurisdiction, after the claimant has presented its claim, with great difficulty and expense, in that remote forum. Instead of COGSA, American cargo owners and insurers—with no choice in the matter—would face an array of different laws and procedures, to be interpreted by unknown foreign arbitrators. Such laws and procedures would depend, in each case, on the nationality of the carrier and the arbitral procedures chosen by that carrier alone. That would severely erode COGSA's objective: "to enhance the currency and negotiability of ocean bills of lading," *Portland Fish Co. v. States Steamship Co.*, 510 F.2d 628, 632 (9th Cir. 1974). The ocean bill of lading would soon be a document rife with uncertainty.

The court of appeals' decision cannot be squared with the purpose of COGSA to make ocean bills of lading simply and uniformly enforceable. Following the court of appeals' lead, a carrier could oust an American court from the jurisdiction conferred by COGSA simply by providing, in the bill of lading, for arbitration, not litigation, overseas. And for carriers, that result is easily accomplished—since a bill of lading is not an arm's-length agreement, but rather is most often a pre-

printed form imposed, unilaterally, by the carrier. With a single stroke of fine print, the carriers could—and, if the decision below were allowed to stand, inevitably would—deprive American purchasers of their COGSA rights. In that event, American cargo owners would soon be deprived of their historic right to recover their cargo losses in a United States forum.[21]

B. The FAA Does Not Require Enforcement Of A Foreign Arbitration Clause That Is Otherwise Prohibited By Section 3(8) Of COGSA

The court of appeals conceded that "absent the FAA, COGSA might operate to nullify foreign arbitration clauses in bills of lading." Pet. App. 10a n.5. It concluded, however, that COGSA and the FAA are in "conflict" and that "canons of statutory interpretation" were therefore required to decide between them. *Id.* at 11a. Applying those statutory maxims, together with "the strong federal policy favoring arbitration" (*id.* at 12a), the court below held that the FAA "removes" foreign arbitration clauses "from the grasp of COGSA." The court's analysis is flawed at every turn.

1. The terms of COGSA and the FAA are easily reconciled, and COGSA controls in this setting

The court of appeals took as its operating premise that section 3(8) of COGSA and the FAA are "in conflict," and it therefore sought to pick the winner. That was mistaken. "The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-

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[21] The court of appeals' decision also creates an indefensible dichotomy between foreign *suit* clauses and foreign *arbitration* clauses. According to the court of appeals, if a carrier imposes a foreign *suit* requirement, COGSA will govern and invalidate the clause. But if a carrier imposes foreign *arbitration*, the result will be just the opposite. Section 3(8) of COGSA makes no such distinction on its face, nor does any such distinction make sense.

existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). Accord, *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 112 S.Ct. 683, 692 (1992). Courts must "read federal statutes 'to give effect to each if [they] can do so while preserving their sense and purpose.' " *Pittsburgh & Lake Erie R. Co. v. Railway Labor Executives' Ass'n*, 491 U.S. 490, 510 (1989). The "cardinal principle," this Court has explained, is "to give effect to both [statutes] if possible." *United States v. Borden Co.*, 308 U.S. 188, 198 (1939).

In fact, the FAA and COGSA do not pose an "either-or proposition" (*Connecticut National Bank v. Germain*, 112 S.Ct. 1146, 1149 (1992)), but instead are readily reconcilable. By its terms, section 2 provides for the enforceability of arbitration clauses "save upon such grounds as exist at law or in equity for the revocation of any contract." One such "ground" is when the contract violates another federal statute, such as COGSA: "The general rule of law is that a contract made in violation of a statute is void." *Miller v. Ammon*, 145 U.S. 421, 426 (1892). As this Court has emphasized, "it has never been doubted that, as a general rule, a contract made in contravention of a statute is void and cannot be enforced." *Burck v. Taylor*, 152 U.S. 634, 649 (1894). Accord, *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540, 548 (1902).

That is precisely the situation in this case. Under section 3(8) of COGSA, a bill-of-lading arbitration clause is explicitly "null and void and of no effect," and is therefore revocable "at law" under section 2 of the FAA. See *Southland Corp. v. Keating*, 465 U.S. 1, 20 (1984) (Stevens, J., concurring and dissenting) ("A contract which is deemed void is surely revocable at law or in equity * * *").[22] In effect, the

[22] "[A] voidable contract is a common occurrence in the law. Infancy, fraud, mistake, duress, some kinds of *illegality*, all afford ground for rescinding or refusing to perform a contract." 1 *Williston on Contracts* § 1.20 (1990) at 49-50 (emphasis added). Accordingly, "[t]he common law * * * proscribes various types of executory agreements," and "[i]llegal bargains have been classified both by the common law and in statutory enactments as those opposed to positive law * * *." 5 *Williston on Contracts* § 12.1 (1993). As a result, "it is clear that contracts in direct violation of statutes expressly forbidding their execution cannot be enforced;" *Gibbs v. Consol. Gas Co. of Baltimore City*, 130 U.S. 396, 412 (1889); "[i]t is clear that a contract which violates the laws of the United States and contravenes the public policy as expressed in those laws is unenforceable," *Kaiser-Frazer Corp. v. Otis & Co.*, 195 F.2d 838, 843 (2d Cir.), *cert. denied*, 344 U.S. 856 (1952); and "[a] contract contrary to the public policy * * * will not be enforced, particularly if that public policy is evidenced by a statute which the contract contravenes." *Lakos v. Saliaris*, 116 F.2d 440, 444 (4th Cir. 1940). Since any contract term that contravenes a federal statute is voidable at common law, it follows that "the grounds at law * * * for the revocation of any contract" include positive federal law such as section 3(8) of COGSA, which specifically renders contract terms at variance with COGSA "null and void and of no effect".

court of appeals got it exactly backwards: The FAA does not remove foreign arbitration clauses "from the grasp of COGSA" (Pet. App. 10a); rather, COGSA—by virtue of the saving clause in section 2 of the FAA—removes foreign arbitration clauses in bills of lading "from the grasp" of the FAA.[23] Because COGSA and the FAA are therefore recon-

[23] This Court's decision in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), does not require a contrary result. In *Southland*, the Court, enforcing the Supremacy Clause, held that a provision of the California Franchise Investment Law—which purported to prohibit any contractual clause waiving the right to judicial consideration of franchisee claims—was inconsistent with the FAA and therefore invalid. The Court explained that the "defense to arbitration found in the California Franchise Investment Law was not a ground that exists at law or in equity 'for the revocation of *any* contract' but merely a ground that exists for the revocation of arbitration provisions in contracts subject to the [state act]." *Id.* at 16 n.11. But the Court was careful to note the context in which it made the point, emphasizing that if this defense were sufficient, states would be able "to override the declared policy requiring enforcement of arbitration agreements." *Ibid.* The Court did not purport to decide the quite different question whether a *federal*, rather than a state, statute affords grounds at law for the revocation of a contract for purposes of section 2 of the FAA.

cilable by their terms, the court of appeals had no basis for seeking to resolve a "conflict" between the two statutes.[24]

2. The policies underlying the two statutes do not conflict in this setting

The court of appeals mistakenly predicated its decision on what it termed "the strong federal policy favoring arbitration." Pet. App. 12a. Arbitration policy under the FAA does not conflict with the policies Congress expressed in COGSA.

a. First and foremost, the court of appeals overlooked the fundamental principle that "the FAA does not require parties to arbitrate when they have not agreed to do so * * *." *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 478 (1989). The FAA "simply requires courts to enforce privately negotiated agreements to arbitrate * * *." *Ibid.* "Arbitration under the Act is a matter of consent, not coercion * * * ." *Id.* at 479. Although this Court has articulated a "strong presumption" in favor of arbitration provisions, it has been careful to limit that presumption to "freely negotiated" provisions. *Mitsubishi Motors*, 473 U.S. 614, 631 (1985). Only when a party has voluntarily "agree[d] to arbitrate a statutory claim"—and has "trade[d] the procedures and opportunity for review of the courtroom for the simplicity, informality and expedition of

[24] The court of appeals also lost sight of another fundamental principle: "As the 'saving clause' in § 2 [of the FAA] indicates, the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, *but not more so*." *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 404 n.12 (1967) (emphasis added). See *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University* , 489 U.S. 468, 478 (1989). An arbitration clause in a bill of lading is therefore just as subject to section 3(8) of COGSA as any other "clause, covenant or agreement," 46 U.S.C. 1303(8), in a bill of lading that lessens a carrier's liability. By permitting an arbitation clause to trump the command of COGSA, the court of appeals effectively elevated arbitration provisions above all other provisions that might run afoul of COGSA.

arbitration" (*id.* at 628)—do the policies of the FAA come into play.[25] In short, this Court has never articulated a "federal policy" that requires the enforcement of arbitration agreements at all costs—but only where, in the Court's word, the parties have "agreed" to arbitrate.

That fundamental premise of arbitration policy is not implicated here. As the court below recognized, "maritime bills of lading have been viewed as contracts of adhesion" (Pet. App. 8a-9a n.4), and with good reason. An ocean carrier's adhesionary form bill of lading lacks all measure of mutual consent.[26] The present case is no exception: here, as in *Wesermunde*, "[t]here is no evidence that the terms of the bill of lading in this case were agreed to through hard bargaining; rather they appear to be the form clauses of adhesion contracts," 838 F.2d at 1582 (citing *Union Ins. Soc. of Canton, Ltd.*, 642 F.2d at 724).[27] Petitioner did not agree to arbitrate

[25] In *Mitsubishi Motors, supra*, for example, in holding that an arbitration clause covered federal antitrust claims, the Court pointedly noted that respondent did not even "attempt[ ]" to show that the arbitration clause was anything but voluntary. 473 U.S. at 632-633. See also *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 14 (1972) (upholding forum selection clause where there was "strong evidence that the forum clause was a vital part of the agreement" between the parties, and that "it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations").

[26] See *United States v. Farr Sugar Corp.*, 191 F.2d 370, 374 (2d Cir. 1951), *aff'd. sub nom. United States v. Atlantic Mut. Ins. Co.*, 343 U.S. 236 (1952) (recognizing that a bill of lading is a contract "in name only" and that the "lack of equality of bargaining power" between shipper and carrier "has long been recognized in our law"). See also *Gamma-10 Plastics v. American President Lines, Ltd.*, 32 F.3d 1244, 1251 (8th Cir. 1994) ("A bill of lading is a contract of adhesion that is strictly enforced against the carrier"); *Allied Chemical Int'l Corp. v. Companhia de Navagacao Lloyd Brasiliero*, 775 F.2d 476, 482 (2d Cir. 1985) ("We bear in mind that bills of lading are contracts of adhesion and, as such, are strictly construed against the carrier"), *cert. denied*, 475 U.S. 1099 (1986).

[27] The district court (by erroneously applying state law in a maritime case) declined to find that the foreign arbitration clause in this case

its claim in Tokyo, and virtually no bill-of-lading endorsee ever sees, much less consents to, the boilerplate terms in the form bills of lading that carriers issue to shippers at the loading ports.

To be sure, the purchaser of the cargo, by "generally operative principles of contract law," *Fisser v. Int'l Bank*, 282 F.2d 231, 233 (2d Cir. 1960), becomes a party to the bill of lading when the shipper endorses the bill of lading over to it. But that does *not* mean that the cargo owner thereby *consents* to the foreign arbitration clause, or any other term in the carrier's bill of lading. More to the point, one of the main purposes of COGSA is to regulate bills of lading *lest* "generally operative principles of contract law" enable carriers to impose unreasonable terms on shippers and receivers.[28] Enforcing a foreign arbitration clause would violate that purpose—without advancing the FAA policy of effectuating "freely negotiated" arbitration agreements. *Mitsubishi Motors*, 473 U.S. at 631. The two statutory policies are simply not in conflict.

b. The court of appeals also overlooked this Court's reminder that, notwithstanding the presumption in favor of arbitration, "not * * * all controversies implicating statutory

was technically adhesionary (Pet. App. 20a). That finding, however, does not contradict the more fundamental point that ocean bills of lading are invariably *wholly* nonconsensual, or, in any event, *sufficiently* nonconsensual that the policies in COGSA take precedence over those in the FAA. The arbitration policy in the FAA is grounded in meaningful consent to arbitrate. In the case of bill-of-lading terms—to which the cargo owner never consents—COGSA takes precedence.

[28] See *Standard Electrica, S.A. v. Hamburg Sudamerikanische*, 375 F.2d 943, 945 (2d Cir.) ("When COGSA was enacted in 1936, it had as its central purpose the avoidance of adhesion contracts, providing protection for the shipper against inequality in bargaining power."), *cert. denied*, 389 U.S. 831 (1967). See also Charles L. Black, Jr., *The Bremen, COGSA and the Problem of Conflicting Interpretation*, 6 Vand. J. Trans. L. 365, 368 (1973) ("almost all bills of lading are boilerplate contracts of purest adhesion; all the statutory law dealing with them starts from the policy premise that their holders need protection from the overreaching of their utterers").

rights are suitable for arbitration." *Mitsubishi Motors*, 473 U.S. at 627. "Like any statutory directive, the [FAA]'s mandate may be overridden by a contrary congressional command." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987). Federal arbitration policy can, and does, accommodate competing federal statutory policies. And "[j]ust as it is the congressional policy manifested in the Federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by that Act, it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable." *Mitsubishi Motors*, 473 U.S. at 627.

The "congressional intention expressed" in COGSA—the "other statute"—requires that the general arbitration policy accommodate the purposes and policies of COGSA. As noted above, foreign arbitration clauses frustrate Congress' objective to achieve through COGSA the "uniformity and simplification" of bills of lading, *Uniform Ocean Bills of Lading—Hague Rules*, H.R. No. 2218, 74th Cong., 2d Sess. 6-7 (1936); they introduce undesirable "uncertainty concerning the responsibilities and liabilities of carriers, the responsibilities and rights of shippers and the liabilities of underwriters who insure waterborne cargo," *Union Ins. Soc. of Canton*, 642 F.2d at 723; and they defeat Congress' objective "to enhance the currency and negotiability of ocean bills of lading," *Portland Fish Co.*, 510 F.2d at 632. And while the legislative policy in the FAA is the " 'prompt, economical and adequate solution of controversies,' " *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 479-80 (1989) (quoting *Wilko v. Swann*, 346 U.S. at 438), foreign arbitrations in remote jurisdictions unrelated to the claim would frequently prove the reverse. Such proceedings would be protracted, prohibitively expensive and—given the inevitable handicaps, evidentiary and otherwise, in presenting a cargo damage claim halfway around the world—exceed-

ingly inadequate. Such risks may be properly borne by a party who has freely consented to arbitrate bill-of-lading claims overseas, but not by parties on whom a foreign arbitration has been unilaterally imposed.[29]

The interference with COGSA is especially damaging where, as here, a foreign arbitration clause is coupled with a bill-of-lading requirement that foreign law will be applied by the foreign arbitrators. In that event, enforcing a foreign arbitration clause against a nonconsenting cargo owner imposes not only the *threat*, but the virtual *certainty*, that COGSA will not apply, despite Congress' command that "every" bill of lading "have effect" subject to COGSA. 46 U.S.C. 1300, 1312. This Court has quite explicitly stated that, under those circumstances, the arbitration clause should not be enforced: "in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies * * *, we would have little hesitation in condemning the agreement as against public policy." *Mitsubishi Motors*, 473 U.S. at 637 n.19. Foreign arbitration clauses are invariably unenforceable under COGSA, and even more so when (as here) they are coupled with a foreign law provision.[30]

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[29] As explained in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 229 (1987) (citing *Scherk v. Alberto Culver Co.*, 417 U.S. 506, 518 (1974)), "arbitration reduce[s] the uncertainty of international contracts," but only in contracts that raise thorny conflicts-of-law issues. At the same time, it "obviate[s] the danger that a dispute might be submitted to a hostile or unfamiliar forum." *Ibid.* But in COGSA claims, there are *no* conflicts-of-law issues: COGSA is controlling. And far from ensuring *against* the use of a "hostile or unfamiliar forum" *(ibid.)*, a foreign arbitration clause—particularly in cases like this one, where the clause submits the case to a jurisdiction almost wholly unconnected to the merits of the claim—*requires* recourse to a "hostile" but in all events "unfamiliar" forum.

[30] Unlike in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), where "nothing in the record * * *, nor in the facts of which we can take judicial notice, indicate[d] that the arbitration system * * * would not afford the plaintiff the rights to which he is entitled," *id.* at 483, the unauthorized application of Japanese law in a Japanese forum would unquestionably deprive the cargo owner of the COGSA "rights to which [it] is entitled" (*ibid.*).

The court in *Wesermunde* struck the right balance. While "arbitration in and of itself is [not] *per se* violative of COGSA's provisions, especially in light of Congress's encouragement of arbitration by its enactment of the [FAA]," 838 F.2d at 1581, "a provision requiring arbitration in a *foreign* country that has no connection with the performance of the bill of lading contract or the making of the bill of lading contract * * * conflict[s] with COGSA's general purpose of not allowing carriers to lessen their risk of liability." *Ibid.* (emphasis in the original). In these circumstances, "federal arbitration policy" must accommodate COGSA.

3. Assuming, arguendo, that the statutes are in conflict, COGSA takes precedence

a. COGSA is the more specific statute

Applying the maxim "the specific statute ordinarily controls the general" (Pet. App. 12a), the court of appeals picked the FAA as the "specific" statute. In its view, "the FAA specifically validates arbitration clauses contained in maritime bills of lading" (*ibid.*) and therefore trumps COGSA, which "makes no reference to arbitration, or for that matter, forum selection clauses" (*ibid.*). For two reasons, we believe the court of appeals got it backwards.

First, the FAA generally governs many different types of maritime contracts, of which "bills of lading of water carriers" are but one category. 9 U.S.C. 1. COGSA, in contrast, is directed solely and specifically to ocean bills of lading, and section 3(8) of COGSA is addressed to specific "clause[s], covenant[s] and agreement(s)" in ocean bills of lading that relieve or lessen a carrier's liability. What is more, COGSA, unlike the FAA, focuses specifically on contracts for the car-

riage of goods to and from the United States—precisely the kind of contract at issue in this case.[31]

Second, as noted in *Mitsubishi Motors*, *supra*, 473 U.S. at 628 (emphasis added), "it is the congressional intention expressed in *some other statute* on which the courts must rely to identify any category of [statutory] claims as to which agreements to arbitrate will be held unenforceable." (Emphasis added.) The "other statute," COGSA, is necessarily the specific statute, and the congressional policies expressed in COGSA determine whether a foreign arbitration clause in an ocean bill of lading is enforceable. See 16 *Williston on Contracts* § 1923 (1976) at 561 ("As in other situations, if an agreement for arbitration contravenes a specific provision of another federal statute, the specific provision will prevail and the agreement will not be enforced").[32] If the FAA, purportedly the specific statute, "alone" governs the validity of the arbitration clause (Pet. App. 10a)—solely because, as the court of appeals held, COGSA "makes no reference to arbitration" (Pet. App. 12a)—the FAA would automatically preempt all federal legislation that, like COGSA, "makes no reference to arbitration." But the FAA does not have such preemptive effect. It follows, in our view, that COGSA is the "more specific statute" for these purposes.

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[31] Even the authority cited by the court of appeals supports this view (Pet. App. 12a). As stated in 2B *Sutherland Statutory Construction* § 51.05 at 174, "[w]here one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible; but if there is any conflict, the latter will prevail, regardless of whether it was passed prior to the general statute, * * *." COGSA, and section 3(8) in particular, unquestionably deal with the rights and liabilities of parties to ocean bills of lading in the "more detailed way."

[32] Cf. *Union Ins. Soc. of Canton, Ltd.*, 642 F.2d at 725 ("We think the general policy [favoring enforcement of forum selection clauses generally] here must recede before the specific policy enunciated by Congress through COGSA").

b. COGSA, the specific statute, takes priority over the FAA, the general statute, regardless of date of enactment

Relying on the canon of interpretation that "a later enacted statute generally limits the scope of an earlier statute if the two laws conflict" (Pet. App. 11a), the court of appeals held that "the FAA must be given priority over COGSA in light of the FAA's reenactment in 1947, eleven years after COGSA was passed." *Id.* 12a (a highly doubtful proposition given the limited purpose of the 1947 legislation, explained *infra* at 37-38). But in doing so the court of appeals erred by ignoring a weightier canon: the "cardinal principle of construction that repeals by implication are not favored." *United States v. Borden Co.*, 308 U.S. 188, 198 (1939). As this Court has repeatedly made clear, "a later statute will not be held to have implicitly repealed an earlier one unless there is a clear repugnancy between the two." *United States v. Fausto*, 484 U.S. 439, 452-53 (1988). Absent such a "clear repugnancy"—and here, for the reasons noted above, the statutes are readily reconciled—a later-enacted statute effects a repeal only when an intent to repeal is "clear and manifest." *United States v. Borden Co.*, 308 U.S. at 198. There is *no* evidence—much less "clear and manifest" evidence—that Congress intended the FAA to repeal COGSA in the context of maritime bills of lading.[33]

This fundamental principle applies not only when a later-enacted statute is said to *repeal* an earlier one, but also when the later statute is said to permit simply the *evasion* of the

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[33] Repeals by implication fall into "two categories"—(1) where provisions in the two acts are in "irreconcilable conflict," and (2) where the later act "covers the whole subject of the earlier one and is clearly intended as a substitute." *Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 468 (1982) (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976) (quoting *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936)). "But, in either case, the intention of the legislature to repeal must be clear and manifest." *Ibid.*

earlier act. The Court has been "as hesitant to infer that Congress intended to authorize evasion of a statute at will as * * * to infer that Congress intended to narrow the scope of a statute." *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 169 (1976). "Both types of 'repeal,' the Court has explained, "involve the compromise or abandonment of previously articulated policies" (*ibid.*). In such circumstances, the Court "would normally expect some expression by Congress that such results are intended," particularly where "the 'repeal' would extend to virtually every case to which the statute had application." *Ibid.* Here, as we have noted, there is no such expression.[34]

But even if priority of enactment mattered at all, it would not matter enough, because COGSA, the specific statute, would still take precedence. See 2B *Sutherland Statutory Construction* § 51.05 at 174. "It is a basic principle of statutory construction that a statute dealing with a narrow, precise and specific subject is not submerged by a later enacted statute covering a more generalized spectrum. 'Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.' " *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) (quoting *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974). Accord, *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987).[35] Under this maxim, it matters not when the FAA was enacted: COGSA is indisputably the specific statute, and its policies are controlling.

[34] Cf. *AVC Nederland B.V. v. Atrium Inv. Partnership*, 740 F.2d 148, 160 (2d Cir. 1984) (noting that not only is there "no possibility of reading a 'foreign exception' into COGSA", in light of the wording of 46 U.S.C. 1300, but "[a] 'foreign' exception would swallow the whole; * * *").

[35] See also *Busic v. United States*, 446 U.S. 398, 406 (1980) ("* * * a more specific statute will be given precedence over a more general one, regardless of their temporal sequence"); *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961) (applying "familiar law that a specific statute controls over a general one 'without regard to priority of enactment' ") (quoting *Townsend v. Little*, 109 U.S. 504 (1883).

Nonetheless, it is highly doubtful that the 1947 Act (Act of July 30, 1947, ch 392, § 1, 61 Stat. 669) makes the FAA the "later enacted statute" (Pet. App. 11a). The 1947 Act was a verbatim restatement of the existing code provisions (first passed in 1925, eleven years before COGSA). It simply made the United States Code the authoritative source for the text of the FAA, in contrast to the earlier-enacted Statutes at Large.[36] The purpose and effect of the 1947 Act were solely evidentiary; the 1947 Act neither altered existing law nor afforded the FAA any sort of substantive preference over COGSA or

[36] If not enacted into positive law, the titles of the United States Code are merely prima facie evidence of the laws of the United States rather than the authoritative text of those laws. 1 U.S.C. 204(a). Enacted on July 30, 1947, 1 U.S.C. 204(a) provides that "whenever titles [of the United States Code] have been enacted into positive law the text thereof shall be legal evidence of the laws therein contained, in all courts of the United States, * * *." Act of July 30, 1947, c. 388, § 1, 61 Stat. 638. On the same day, Congress also passed the 1947 Act. Its purpose was only to "codify and enact into positive law the various provisions of laws now contained in title 9 of the United States Code. Under existing law these sections of title 9 of the United States Code are merely prima facie evidence of the law." H.R. Rep. No. 255, 80th Cong., 1st Sess. (1947). The 1947 Act was therefore simply "one of a series of bills * * * having as their ultimate purpose the enactment into positive law [of] all of the titles of the United States Code." *Ibid.* Its "scope" was to take "each section of title 9 of the United States Code, 1940 edition as of January 2, 1947, and without any material change enact[ ] each section into positive law." *Ibid.* Tellingly, "[n]o attempt [was] made in this bill to make amendments in existing law." *Ibid.* Any substantive amendments were "left to amendatory acts to be introduced after the approval of this bill." *Ibid.*

Furthermore, because the 1947 Act is "almost identical" to the superseded sections of title 9, and "there has never been a moment of time" when the FAA "has not been in force," the 1947 Act is merely a "continuation" of the earlier enacted code sections. *Bear Lake & River Waterworks & Irrigation Co. v. Garland*, 164 U.S. 1, 11-12 (1896). See also *Posadas v. National City Bank of New York*, 296 U.S. 497, 505 (1936) (also acknowledging the common-law rule that "provisions of a prior statute, so far as they are reproduced in a later one, are to be construed as a continuation of such provisions and not as a new enactment").

any other statute; and "[e]ven where Congress has enacted a codification into positive law, * * * it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed." *United States v. Welden*, 377 U.S. 95, 98 n.4 (1964).[37]

* * *

The short of the matter is this: COGSA and the FAA are not in "conflict," as the court of appeals mistakenly supposed. The statutes are easily reconcilable and in this setting COGSA controls. Under section 3(8), a foreign arbitration clause in an ocean bill of lading, particularly when (as here) coupled with a foreign law clause, is "null and void and of no effect."

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[37] To be sure, Congress amended the FAA in 1970 when it enacted The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 ("Convention"), [1970] 3 U.S.T. 2517, T.I.A.S. No. 6997, as chapter 2 of the FAA. 9 U.S.C. 201-08. The court of appeals did not address the Convention, no doubt because respondents moved to stay petitioner's action only under chapter 1 of the FAA, 9 U.S.C. 1-15 (J.A. 21, 28, 36-37), and the district court entered its stay order pursuant only to 9 U.S.C. 3 (Pet. App. 25a).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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FILED
FEB 21 1995
OFFICE OF THE CLERK

No. 94-623

In the Supreme Court of the United States

OCTOBER TERM, 1994

VIMAR SEGUROS Y REASEGUROS, S.A.,
PETITIONER,

v.

M/V SKY REEFER, HER ENGINES, ETC.,
AND M.H. MARITIMA, S.A.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

Whether a foreign arbitration clause in a maritime bill of lading is invalid under section 3(8) of the Carriage of Goods by Sea Act, 46 U.S.C. § 1303(8), or whether such a clause is enforceable under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

Respondent in this proceeding is M.H. Maritima, S.A., which is a subsidiary of Honma Senpaku Co., Ltd.

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STATUTORY PROVISIONS INVOLVED

1. Section 1 of the Federal Arbitration Act, 9 U.S.C. § 1, provides, in pertinent part:

> "Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, . . . or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations . . . .

2. Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, provides, in pertinent part:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

3. Section 3(8) of the Carriage of Goods by Sea Act, 46 U.S.C. § 1303(8), provides, in pertinent part:

> Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect.

STATEMENT OF THE CASE

Statutory Framework

Arbitration has existed in the United States as a mechanism for dispute resolution since colonial times. *Domke on Commercial Arbitration* § 2:04 (rev. ed. Wilner 1990). American courts, however, importing the long-standing concern of English courts that arbitration would deprive them of jurisdiction, refused to enforce agreements to arbitrate. *See Allied-Bruce Terminix Cos.* v. *Dobson*, 115 S. Ct. 834 (1995); *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213, 220 n.6 (1985). Even after 1889, when England enacted its Arbitration Act, which deemed agreements to arbitrate valid and enforceable, courts in this country stubbornly persisted in their refusal to enforce agreements to arbitrate. *Domke* § 2:04.

In 1925, Congress enacted the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA"), to reverse the previous "centuries of judicial hostility to arbitration agreements." *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 510 (1974). Congress sought primarily to ensure judicial enforcement of arbitration agreements between private parties, and secondarily to provide a means for avoiding the expense and delay of litigation. *Dean Witter*, 470 U.S. at 219-20. The FAA, by proclaiming agreements to arbitrate "valid, irrevocable, and enforceable," 9 U.S.C. § 2, gives arbitration agreements the same validity and enforceability enjoyed by every other type of contract. *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991); *Scherk*, 417 U.S. at 511. "Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements . . . ." *Moses H. Cone Memorial Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). The clarity and force of this "liberal federal policy" require that agreements to arbitrate be "rigorously enforce[d]." *Dean Witter*, 470 U.S. at 221.

STATEMENT OF RELEVANT FACTS

Petitioner Vimar Seguros Y Reaseguros, S.A. ("Vimar") and Bacchus Associates ("Bacchus") filed a complaint in the United States District Court for the District of Massachusetts in Boston, alleging that cargo carried on board the vessel SKY REEFER was damaged in February 1991 because of the negligence of respondent M.H. Maritima, S.A. ("Maritima") and the unseaworthiness of the vessel SKY REEFER. The loss sustained by Vimar and Bacchus because of damage to cargo was alleged to total approximately USD $1,033,442.90. Joint Appendix ("J.A.") 11-14.

Bacchus, a New York wholesale importer and distributor of perishable fruits, entered a contract with Galaxie Negoce S.A., Casablanca, Morocco, a wholesale supplier of fruit, for the purchase of approximately 130,000 cartons of oranges and 380 cartons of lemons ("the Cargo"). J.A. 38 ¶ 5.

Bacchus required the services of an ocean-going vessel to move the Cargo from Agadir, Morocco to New Bedford, Massachusetts. Bacchus negotiated and entered a charter with Nichiro Corporation, Tokyo, Japan, under date of February 1, 1991 on the "Gencon" charter form entitling Bacchus Associates to the full cargo carrying capacity of the vessel for one voyage from Agadir, Morocco to New Bedford, Massachusetts.[1] J.A. 69-81.

The SKY REEFER loaded the Cargo, which is described

[1] The vessel SKY REEFER was a four hatch refrigerated cargo vessel, bearing official number 18163-89 and registered under and flying the flag of the Republic of Panama. J.A. 12. The vessel was owned by Maritima, a Panamanian corporation, J.A. 12, 16, and was chartered under a "Baltime 1939" form to Honma Senpaku Co., Ltd., Tokyo ("Honma"). J.A. 57-62. Honma in turn chartered the vessel under a "Baltime 1939" form to Nichiro Gyogyo Kaisha, Ltd., Tokyo ("Nichiro"). J.A. 63-68. Nichiro voyage chartered the vessel under a "Gencon" form to Bacchus Associates. J.A. 69-81.

in the bill of lading as 2,052 pallets of oranges and 6 pallets of lemons, at Agadir, Morocco. Under date of February 6, 1991, Agadir/New Bedford Bill of Lading No. 0001 (the "Bill of Lading") was issued on a printed form for the Cargo, "Clean On Board," showing the shipper as Galaxie and the consignee and notify party as Bacchus. J.A. 46-56.

As part of the purchase contract, Bacchus posted a letter of credit. Petitioner's Brief at 6. Upon the Cargo leaving Morocco on board the vessel SKY REEFER, Galaxie presented the Bill of Lading as required by the terms of the letter of credit. *Id.* Galaxie obtained payment for the Cargo, and Bacchus obtained the original Bill of Lading and the right to possession of the Cargo. *Id.*; J.A. 41 ¶ 15.

After departure from Agadir, the vessel SKY REEFER proceeded directly to New Bedford, Massachusetts, for discharge. Upon opening the vessel's hatches for discharge in New Bedford, it became apparent that some damage had been sustained to the Cargo, J.A. 13, consisting generally of damage to cartons. J.A. 39. The cause of this damage is a matter of dispute between the parties, and it is this dispute which awaits resolution by arbitration in Tokyo or by further litigation in Massachusetts.

Bacchus obtained certain rights in respect to damage to Cargo on the SKY REEFER, both as holder of the Bill of Lading and as party to the charter with Nichiro. In choosing to pursue their rights under the Bill of Lading, petitioner, the Spanish insurer of the Cargo, and Bacchus are met with, and attempt to avoid, Clause 3 of the Bill of Lading, entitled "Governing Law and Arbitration." Clause 3 provides:

> (1) The contract evidenced by or contained in this Bill of Lading shall be governed by the Japanese law.
>
> (2) Any dispute arising from this Bill of Lading shall be referred to arbitration in Tokyo by the Tokyo Maritime Arbitration Commission (TOMAC) of The Japan Shipping Exchange, Inc. in accordance with the rules of TOMAC and any amendments thereto, and the award given by the arbitrators shall be final and binding on both parties.[2] J.A. 49.

Bacchus complains that the Bill of Lading presented to it by Galaxie, pursuant to both the purchase and sale agreement and the letter of credit, contains a clause requiring arbitration of any dispute in Tokyo. Bacchus states that it never agreed with Nichiro or Maritima, the vessel owner, for arbitration in Japan and that it received the Bill of Lading after it had lost its ability to negotiate terms. But Bacchus simply failed to negotiate in its purchase and sale agreement with Galaxie a provision for a bill of lading without an arbitration clause, or requiring arbitration in the United States, and Bacchus simply failed to insert in its letter of credit any requirements in respect to dispute resolution clauses in bills of lading.

SUMMARY OF ARGUMENT

1. *The Federal Arbitration Act Governs The Enforcement Of Arbitration Clauses In Maritime Bills Of Lading.*

The First Circuit was correct when it decided that the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA"), governs the enforceability of the arbitration clause contained in this maritime Bill of Lading. A straightforward reading of the plain language of the FAA can lead to no other conclusion. The statute applies specifically to "[m]aritime transactions,"

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[2] If petitioner and Bacchus had proceeded to pursue their rights under the charter with Nichiro, they would have encountered a London arbitration clause.

which are defined to include "bills of lading of water carriers," 9 U.S.C. § 1, and states plainly that "[a] written provision in any maritime transaction . . . to settle by arbitration a controversy thereafter arising out of such . . . transaction . . . shall be valid, irrevocable, and enforceable . . . ." 9 U.S.C. § 2.

The decisions of this Court construing and applying the FAA and repeated expressions of the will of Congress support enforcement of this arbitration clause. This Court rigorously enforces the FAA, *see, e.g. Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213, 221 (1985), consistent with the "liberal federal policy favoring arbitration . . . ." *Moses H. Cone Memorial Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). In the context of international trade, it is particularly important to insist that parties honor their contracts to arbitrate. *See Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985). By enacting, in 1970, legislation implementing the Recognition and Enforcement of Foreign Arbitral Awards Convention, 9 U.S.C. § 201 *et seq.*, Congress made it clear (if reasonable doubt ever existed) that the strong federal policy favoring arbitration applies with particular force where commerce among nations is involved.

Although the Carriage of Goods by Sea Act, 46 U.S.C. § 1300 *et seq.* ("COGSA"), addresses maritime bills of lading, COGSA does not govern the arbitration clause at issue in this case because, as the First Circuit ruled, the FAA removes such clauses from COGSA's grasp. Thus, petitioner's contention that foreign arbitration results in a lessening of the carrier's liability in contravention of COGSA, 46 U.S.C. § 1303(8), even if it were true, is irrelevant.

Two fundamental rules of statutory construction mandate this result. First, a specific statute such as the FAA prevails over a general statute such as COGSA in the event of a conflict. *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 153 (1976). The FAA is more specific because it addresses precisely the type of clause in question, while COGSA addresses bills of lading generally. Second, later enactments of Congress are presumed to prevail over earlier ones. *See, e.g., Watt* v. *Alaska*, 451 U.S. 259, 266 (1981). COGSA was enacted in 1936, while the FAA, originally enacted in 1925, was reenacted as positive law in 1947, thus making it the controlling statute. *Indussa Corp.* v. *S.S. Ranborg*, 377 F.2d 200, 204 n.4 (2d Cir. 1967).

2. *The Arbitration Clause Is Enforceable Under The FAA.*

As the holder of the Bill of Lading, petitioner is bound by its terms. Petitioner may not avoid the arbitration clause on the ground of adhesion. Arbitration agreements are to be enforced according to the basic principles of ordinary contract law, *Fisser* v. *International Bank*, 282 F.2d 231, 233 (2d Cir. 1960), and provisions in an adhesionary contract are valid and enforceable in the absence of fraud, undue oppression or unconscionability. *See, e.g., Finkle and Ross* v. *A.G. Becker Paribas, Inc.*, 622 F.Supp. 1505, 1512 (S.D.N.Y. 1985). Such grounds have not been alleged, and do not exist, in the present case.

The savings clause of the FAA does not allow petitioner to evade arbitration. That clause provides that agreements to arbitrate are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. A party may avoid an arbitration provision under the savings clause when that provision has been brought about by fraud or overwhelming economic power, or where Congress has clearly expressed its intent to preclude waiver of a judicial forum for the vindication of other federal statutory rights. *Mitsubishi*, 473 U.S. at 627. Petitioner has not alleged fraud or overwhelming economic power, and there is no indi-

cation in either the text or the legislative history of COGSA that Congress intended COGSA claims to be nonarbitrable. Indeed, petitioner concedes that domestic arbitration of COGSA claims is permissible. Because the FAA provides no basis for distinguishing between arbitration clauses on the basis of the location of the forum of the proceedings, claims which are arbitrable domestically are also arbitrable abroad.

3. *Foreign Arbitration Clauses Are Distinguishable From Foreign Jurisdiction Clauses.*

Petitioner incorrectly equates foreign arbitration clauses with foreign jurisdiction clauses and argues that foreign arbitration clauses should be held to be unenforceable for the same reasons that courts have refused to enforce foreign jurisdiction clauses. Petitioner's argument is flawed in two respects. First, Congress, by enacting the FAA, has declared that arbitration clauses in maritime bills of lading are "valid, irrevocable, and enforceable." 9 U.S.C. §§ 1, 2. Congress has not, however, enacted a corresponding federal statute requiring enforcement of foreign jurisdiction clauses.

Second, petitioner's argument ignores the fundamental differences between arbitration and litigation. The courts that have held foreign *jurisdiction* clauses unenforceable under COGSA have done so, in part, on the grounds that such clauses constitute an actual or a potential lessening of the carrier's liability by requiring the presentation of a cargo claim in a foreign forum with no assurance that the judge there will apply COGSA "in the same way as would an American tribunal subject to the uniform control of the Supreme Court . . . ." *Indussa Corp.* v. *S.S. Ranborg*, 377 F.2d 200, 204 (2d Cir. 1967). Since the parties to an arbitration proceeding — whether it is conducted in the United States or in a foreign country — also lack assurance that the arbitrators will apply the law as would an American court, application of the reasoning in the foreign jurisdiction clause

cases to *arbitration* clauses in maritime bills of lading would lead to the conclusion that all such clauses are invalid. Such a result flies in the face of the explicit language of the FAA, which provides that arbitration clauses in maritime bills of lading are valid, irrevocable and enforceable. Indeed, petitioner concedes that arbitration, as such, does not violate COGSA. The case at bar involves an arbitration clause, and petitioner's reliance on cases involving foreign jurisdiction clauses is misplaced.

4. *The Reference To Japanese Law In The Bill Of Lading Does Not Render The Arbitration Clause Unenforceable.*

The Bill of Lading provides for the application of Japanese law. J.A. 49 at ¶3(1). It also, however, provides for the application of COGSA in certain circumstances. J.A. 56 at ¶19. The enforceability of the arbitration provision should not turn on which of these laws will be applied by the arbitrators. The Japanese Hague Rules and COGSA are substantively the same in all relevant respects. The two statutes are national codifications of the international Hague Rules, and both reflect the same legal principles regarding the rights and liabilities of shippers and carriers set forth in that international agreement. Thus, reliance by the arbitrators on one of these statutes rather than the other will not result in the application of a different legal standard.

5. *The Wesermunde Decision Is Wrong.*

In *State Establishment for Agric. Prod. Trading* v. *M/V Wesermunde*, 838 F.2d 1576 (11th Cir.), *cert. denied*, 488 U.S. 916 (1988), on which petitioner relies, the court ruled that a provision in a maritime bill of lading to which COGSA applies by its own force requiring "arbitration in a *foreign* country that has no connection with either the performance . . . or the making of the bill of lading contract . . . would

conflict with COGSA's general purpose of not allowing carriers to lessen their risk" of liability and would, as a result, be "void and utterly without effect." 838 F.2d at 1581 (emphasis in original). The decision is incorrect. The opinion in *Wesermunde* contains no meaningful analysis of the FAA, the application of the FAA to foreign arbitration clauses, or the method by which conflicts between the FAA and COGSA should be resolved. The court proceeded on the incorrect assumption that COGSA is controlling. The decision is wrong because the FAA controls, and it, not COGSA, establishes the legal standards governing the enforceability of arbitration clauses in maritime bills of lading. The *Wesermunde* court's requirement that there be a "connection" between the foreign arbitration forum and the making or performance of the bill of lading contract is not supported by or consistent with the plain language of the FAA.

6. *The Arbitration Clause In Issue Does Not "Lessen" The Carrier's Liability.*

Petitioner asserts that the arbitration clause in the Bill of Lading violates section 3(8) of COGSA because enforcement of the clause would result in a "lessening" of the carrier's liability. Petitioner relies on *Indussa Corp.* v. *S.S. Ranborg*, 377 F.2d 200 (2d Cir. 1967), to establish the meaning of the word "lessening" as it is used in COGSA. The court in *Indussa*, however, construed the term too broadly. The "lessening" language of section 3(8) refers specifically to the carrier's "liability" under COGSA, and it should be read to apply to, and only to, those liabilities and responsibilities described in other sections of COGSA. Such a reading gives full effect to the lessening provision and prohibits, for example, provisions in bills of lading which purport to relieve a carrier of its statutory duty to load, stow and care for the cargo properly and carefully, or to relieve a carrier of its duty to exercise due diligence to make the vessel seaworthy. Construed in this manner, the lessening provision of section 3(8) of COGSA does not prohibit

the enforcement of the arbitration clause in the Bill of Lading.

ARGUMENT

A. THE FEDERAL ARBITRATION ACT CONTROLS ARBITRATION CLAUSES IN MARITIME BILLS OF LADING.

1. *The Arbitration Clause Is Governed By The Federal Arbitration Act.*

The Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA"), commands enforcement of a written provision to settle controversies by means of arbitration in any maritime transaction. In this regard, 9 U.S.C. § 2 provides, in pertinent part:

> A *written provision in any maritime transaction* or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such a contract or transaction ... shall be *valid, irrevocable, and enforceable*, save upon such grounds as exist at law or in equity for the revocation of any contract. *Id.* (emphasis added).

"[M]aritime transactions" are defined to include "bills of lading of water carriers."[3]

Further, the FAA specifically contemplates both foreign and domestic arbitration. Section 2 provides that the FAA

[3] 9 U.S.C. § 1 provides:
'Maritime transactions,' as herein defined, means charter parties, *bills of lading of water carriers*, . . . or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; 'commerce,' as herein defined, means commerce among the several States or with foreign nations . . . . *Id.* (emphasis added).

applies to a written provision in "*any* maritime transaction." 9 U.S.C. § 2 (emphasis added). The definition of "maritime transactions" includes not only bills of lading, but also "any other matters in *foreign* commerce."[4] 9 U.S.C. § 1 (emphasis added). Thus, the arbitration clause in the maritime bill of lading at issue, which requires the parties to this international transaction to arbitrate in Tokyo, is precisely the type of agreement governed by the plain terms of the FAA.

2. *Supreme Court Precedent And Congressional Enactments Establish That The FAA Must Be Applied Rigorously, Consistent With The Federal Policy Favoring Arbitration.*

Congress and the Supreme Court alike have repeatedly expressed their support for arbitration. Abundant case law from this Court and the lower courts, as well as statutory guidance from Congress, confirms that arbitration is a favored procedure and that arbitration clauses should be favored accordingly.

Many times over, this Court has reinforced the principle that the FAA embodies a "liberal federal policy favoring arbitration agreements . . . ." *Moses H. Cone Memorial Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *see also New England Energy Inc.* v. *Keystone Shipping Co.*, 855 F.2d 1, 4 (1st Cir. 1988) (citing cases), *cert. denied*, 489 U.S. 1077 (1989). "'[T]he preeminent concern of Congress in passing the Act was to enforce private agreements into which

[4] Moreover, the district courts have the authority to stay an action under 9 U.S.C. § 3 pending arbitration in the United States or abroad. *See, e.g., Midland Tar Distillers, Inc.* v. *M/T Lotos*, 362 F. Supp. 1311, 1315 (S.D.N.Y. 1973) ("It is well settled that provision for arbitration to take place in a foreign country does not affect the power of this court to stay the action"); *Kurt Orban Co.* v. *S/S Clymenia*, 318 F. Supp. 1387, 1390 (S.D.N.Y. 1970) (citing cases).

parties had entered,' a concern which 'requires that [the Supreme Court] rigorously enforce agreements to arbitrate.'" *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-26 (1985) (quoting *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213, 221 (1985)).

The foregoing principles are to be applied with particular force when the transaction in issue involves international commerce. *Mitsubishi*, 473 U.S. at 629. In *Mitsubishi*, the Court stressed the importance of arbitration in the context of international trade and ordered the parties to arbitrate antitrust issues in Japan, pursuant to an arbitration clause contained in the contract between the parties. The Court concluded that:

> concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement . . . .

Id.

In accordance with the Court's directives encouraging arbitration. numerous lower courts have enforced foreign arbitration clauses in maritime bills of lading.[5] The District Court for the District of Massachusetts, in both the instant action and in an earlier case involving strikingly similar facts, followed this course. *See Citrus Marketing Board of Israel*

[5] *See Japan Sun Oil Co., Ltd.* v. *M/V Maasdijk*, 864 F. Supp. 561 (E.D. La. 1994); *Kaystone Chem., Inc.* v. *Bow-Sun*, 1989 A.M.C. 2976 (S.D.N.Y. 1989); *Mid South Feeds, Inc.* v. *M/V Aqua Marine*, 1988 A.M.C. 437 (S.D. Ga. 1986); *Fakieh Poultry Farms* v. *M/V Mulhiem*, No. 85 Civ. 2657 (WCC), 1986 WL 12534 (S.D.N.Y. Oct. 24, 1986); *Mitsubishi Shoji Kaisha Ltd.* v. *MS Galini*, 323 F.Supp. 79 (S.D. Tex. 1971); *cf. Travelers Indem. Co.* v. *M/V Mediterranean Star*, 1988 A.M.C. 2483 (S.D.N.Y. 1988).

v. *M/V Ecuadorian Reefer*, 754 F.Supp. 229, 232-234 (D. Mass. 1990) (Keeton, J.).

Congress in 1970 reaffirmed its commitment to the enforcement of foreign arbitration clauses, originally expressed through the FAA, by adopting the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Arbitration Convention"), 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3, *reprinted in* 6A Benedict on Admiralty, Doc. No. 7-3 at 7-16-20 (6th ed. 1993). Congress enacted Chapter 2 of Title 9 (9 U.S.C. § 201 *et seq.)* to implement the United States' obligations under that Convention.[6] Article II(1) of the Arbitration Convention states:

> Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

Chapter 2 authorizes courts to compel arbitration within and without the United States. 9 U.S.C. § 206. Further, that statute specifically applies the terms of the Arbitration Convention to those agreements described in section 2 of the FAA, such as the Bill of Lading in issue. 9 U.S.C. § 202.[7] Finally, this implementing legislation incorporates the provisions of the FAA without any indication of an intention to limit their effect based on any other federal statute. 9 U.S.C. § 208.

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[6] Japan is also a signatory. 6A Benedict on Admiralty, Doc. No. 7-3 at 7-22 (6th ed. 1993).

[7] Section 202 states, "An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention."

The language of the FAA, this Court's previous holdings, and Congressional action make it clear that arbitration provisions must be enforced rigorously, with doubts to be resolved in favor of arbitration. Where, as here, a bill of lading relied upon by the holder contains an unambiguous provision requiring that all claims and disputes be arbitrated, that provision is binding on the holder and the issuer, and must be enforced. Simply put, petitioner cannot have it both ways — reliance upon the Bill of Lading to recover damages will carry with it the requirement of arbitration pursuant to that Bill of Lading's written arbitration provision. That conclusion is compelled by the FAA, which makes the arbitration clause contained in the maritime bill of lading involved in this international transaction valid, irrevocable and enforceable.

B. FUNDAMENTAL PRINCIPLES OF STATUTORY CONSTRUCTION ESTABLISH THAT THE FAA, NOT THE CARRIAGE OF GOODS BY SEA ACT, CONTROLS.

Petitioner claims that the arbitration clause in the Bill of Lading is void because it violates section 3(8) of the Carriage of Goods by Sea Act, 46 U.S.C. § 1300 *et seq.* ("COGSA"), in that it allegedly results in a "lessening" of the carrier's liability under COGSA. Although COGSA applies by its own force to the Bill of Lading, the FAA alone is controlling with respect to the arbitration clause which the Bill of Lading contains. Two significant rules of statutory construction lead directly to this conclusion.

1. *The FAA Is More Specific Than COGSA With Respect To Arbitration Clauses In Maritime Bills of Lading, And Therefore It Controls.*

A primary rule of statutory construction is that a more specific statute prevails over a general one. *Radzanower* v.

Touche Ross & Co., 426 U.S. 148, 153 (1976); Sutherland Stat. Constr. § 51.05 (5th ed. 1992). In the event of a statutory conflict, "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Morton* v. *Mancari*, 417 U.S. 535, 550-51 (1974).

In this case, the FAA is the more specific statute. It addresses precisely the type of clause in issue: an arbitration clause in a maritime bill of lading. To be sure, COGSA applies to a more narrow group of contracts, *i.e.*, "[e]very bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade . . . ." 46 U.S.C. § 1300. But COGSA, as reflected in 46 U.S.C. § 1303(8), purports to cover "[*a*]*ny* clause, covenant, or agreement" contained in those contracts. (Emphasis added.) The FAA, while it applies to a broader range of contracts than COGSA, addresses only one type of provision in those contracts, *i.e.*, arbitration provisions, and it makes that type of provision "valid, irrevocable, and enforceable." 9 U.S.C. § 2. The FAA focuses directly on arbitration clauses in maritime bills of lading, while COGSA covers a multitude of aspects of bills of lading.

2. *The FAA, As The Later-Enacted Statute, Controls.*

It is also a fundamental principle of statutory construction that later enactments of Congress are presumed to prevail over earlier ones. *See, e.g., Watt* v. *Alaska*, 451 U.S. 259, 266 (1981). The FAA was originally enacted in 1925. COGSA was enacted in 1936. The FAA was reenacted as positive law in 1947. On the strength of this chronology, the First Circuit in the present case, and the Second Circuit, have concluded that the FAA, as the later-enacted statute, governs. *Indussa Corp.* v. *S.S. Ranborg*, 377 F.2d 200, 204 n.4 (2d Cir. 1967).

Petitioner relies on *Indussa, supra*, in support of its assertion

that foreign arbitration clauses are void under COGSA.[8] In *Indussa*, the court held that a choice of forum clause was void under section 3(8) of COGSA. 377 F.2d at 204. The court was careful to note, however, that its "ruling does not touch the question of *arbitration* clauses in bills of lading which require this to be held abroad." *Id.* at 204 n.4 (emphasis added). Judge Friendly went on to note that "if there be any inconsistency between [COGSA and the FAA], presumably the [FAA] would prevail by virtue of its reenactment as positive law in 1947." *Id.* (citations omitted). Other courts have followed this reasoning. *See, e.g., Nissho Iwai Am. Corp.* v. *M/V Sea Bridge*, No. Civ. A. R-90-1238, 1991 WL 182117, at *7 (D. Md. Apr. 25, 1991) (enforcing Tokyo arbitration clause and following *Ecuadorian Reefer*, 754 F.Supp. 229); *Uniao de Transportadores* v. *Companhia de Navegacao*, 84 F.Supp. 582, 584 (E.D.N.Y. 1949) ("if Congress in 1947, thought that the Carriage of Goods by Sea Act of 1936 affected or forbade any provisions in the Arbitration Act of 1947, it would and could have plainly avoided any such confusion").[9]

Even if, as petitioner contends, the re-enactment of the FAA as positive law in 1947 does not stand on the same footing as an initial enactment or a re-enactment which incorporates substantive changes in the statute, Petitioner's Brief at 37-38, the enactment in 1970 of Chapter 2 of Title 9, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, demonstrates Congress's continuing intent that foreign arbitration clauses, including those contained in maritime bills of lading, be valid, irrevocable, and enforceable.[10]

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[8] *See* Petitioner's Brief beginning at 15.

[9] *See also* cases cited *infra* n. 5.

[10] A basic principle of statutory construction requires that an Act of Congress, like COGSA, not be construed so as to cause the United States to violate a treaty obligation. *Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, 466 U.S. 243, 252 (1984). Moreover, as is the case with federal statutes, where there is a conflict between a more recent treaty, such as the Arbitration Convention, and an older federal statute, such as COGSA, the

The enactment of Chapter 2 supports respondent's position that the FAA is controlling. Thirty-four years after COGSA was passed, Congress revisited the issue of arbitration, specifically *foreign* arbitration, and legislated in favor of arbitration clauses identical to the one petitioner seeks to circumvent. Thus, with Chapter 2, Congress essentially reaffirmed the FAA, without reservation as to any other federal statute, including COGSA.[11]

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former prevails. *Cook* v. *United States*, 288 U.S. 102, 118-19 (1933); *Chew Heong* v. *United States*, 112 U.S. 536, 550 (1884); Restatement (Third) of the Law of Foreign Relations of the United States §115(2) (1987).

[11] The arbitration clause at issue here is valid and enforceable under the Arbitration Convention as well as the FAA. The test for enforcing such clauses under the Arbitration Convention is narrow, and its four requirements are met here:

(1) There is an agreement in writing to arbitrate the subject matter of the dispute; (2) The agreement provides for arbitration in Japan, a signatory of the Convention, *see supra* n. 6; (3) The agreement arises out of a contract governed by the statute, 9 U.S.C. § 202; and (4) Respondent Maritima, a party to the agreement, is a Panamanian and not an American citizen. *Riley* v. *Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 959 (10th Cir.), *cert. denied*, 113 S. Ct. 658 (1992).

The Convention's savings clause, which provides that an arbitration agreement which satisfies the above test remains unenforceable if it is "null and void, inoperative or incapable of being performed," Convention, Article II (3), is to be construed narrowly. *Ledee* v. *Ceramiche Ragno*, 684 F.2d 184, 186-187 (1st Cir. 1982). It encompasses "only those situations — such as fraud, mistake, duress, and waiver — that can be interpreted neutrally on an international scale." *Id.* at 187. Not even an agreement contrary to "the parochial interests of the nation," as reflected in federal statutes, can be "null and void" under that savings clause. *Id.*

Furthermore, under the Convention, "[a]ny law or decision prior in time to this express undertaking must be construed as consistent with the Convention or set aside by it." *Sedco, Inc.* v. *Petroleos Mexicanos Mexican Nat. Oil*, 767 F.2d 1140, 1148 (5th Cir. 1985). Therefore, the Convention removes foreign arbitration clauses from the grasp of all other federal statutes, including COGSA, which could prevent foreign arbitration from taking place.

The legislative history of the 1970 enactment is instructive:

> In the committee's view, the provisions of S. 3274 will serve the best interests of Americans doing business abroad by encouraging them to submit their commercial disputes to impartial arbitration for awards which can be enforced in both U.S. and foreign courts. The committee recommends, therefore, that the House approve S. 3274 at an early date.

H.R. Rep. No. 91-1181, 91st Cong., 2nd Sess. 2 (1970), *reprinted in* 1970 U.S.C.C.A.N. 3601, 3602. The legislative history further notes that "[t]he Federal Arbitration Act, which has been codified in title 9 of the United States Code, embodies basic national policy concerning arbitration." *Id.* at 3603 (letter dated December 3, 1969, from Mr. H.G. Torbert, Jr., Acting Assistant Secretary for Congressional Relations, Department of State, to the Speaker, House of Representatives).

C. THIS ARBITRATION CLAUSE IS VALID, IRREVOCABLE AND ENFORCEABLE UNDER THE FAA.

Petitioner maintains that foreign arbitration clauses in maritime bills of lading are invalid because bills of lading are contracts of adhesion, and therefore the parties to these contracts never actually agree to arbitrate. Petitioner also argues that the FAA's savings clause permits it to avoid arbitration in accordance with the terms of the Bill of Lading. The latter argument is based on the erroneous premise that COGSA invalidates the very contractual provisions the FAA exists to validate. These arguments are without merit and should be rejected.

1. *The Bill Of Lading Contains A Valid Written Provision Establishing An Agreement to Arbitrate.*

Arbitration clauses, including those found in maritime contracts, must be construed according to principles of ordinary contract law. *David L. Threlkeld & Co.* v. *Metallgesellschaft Ltd.*, 923 F.2d 245, 249 (2d Cir.) *cert. dismissed*, 501 U.S. 1267 (1991); *Valero Refining, Inc.* v. *M/T Lauberhorn*, 813 F.2d 60, 64 (5th Cir. 1987); *Fisser* v. *International Bank*, 282 F.2d 231, 233 (2d Cir. 1960). Under those principles petitioner, as a holder of the Bill of Lading, is bound by its terms, including the arbitration clause.[12]

Faced with the dilemma of relying on the Bill of Lading as the basis for its claim, but wishing to escape the Bill of Lading's explicit arbitration provision, petitioner argues that there was no agreement to arbitrate because bills of lading are contracts of adhesion. Petitioner's argument is unavailing.

The plain language of the FAA demonstrates that a foreign arbitration clause is not invalid simply because it is contained in what may be a contract of adhesion. It is true, as petitioner contends, that maritime bills of lading are frequently deemed contracts of adhesion because they appear on preprinted forms and contain numerous boilerplate provisions over which the parties rarely, if ever, negotiate.[13] *The Caledonia*, 157 U.S.

[12] The consignee Bacchus, as the holder of a negotiable document, is bound by its terms. *See Kaystone Chem., Inc.* v. *Bow-Sun*, 1989 A.M.C. 2976, 2982 (S.D.N.Y. 1989) (consignee bound by bill of lading arbitration clause); *Midland Tar Distillers, Inc.* v. *M/T Lotos*, 362 F. Supp. 1311, 1315 (S.D.N.Y. 1973) (plaintiff consignee bound by arbitration clause not appearing on face of bill of lading at moment plaintiff became holder of the bill); *see also Wells Fargo Bank* v. *London S.S. Owner's Mut. Ins. Ass'n. Ltd.*, 408 F. Supp. 626, 629 (S.D.N.Y. 1976), and cases cited therein.

[13] As adhesion contracts, bills of lading are construed strictly against the carrier where there is an ambiguity. *All Pacific Trading* v. *M/V Hanjin Yosu*, 7 F.3d 1427, 1431 (9th Cir. 1993). There is no ambiguity here; the clause requiring arbitration is crystal clear, and moreover must be construed

124 (1895); *All Pacific Trading* v. *M/V Hanjin Yosu*, 7 F.3d 1427, 1431 (9th Cir. 1993); *Interocean S.S. Corp.* v. *New Orleans Cold Storage & Warehouse Co.*, 865 F.2d 699, 703 (5th Cir. 1989). It is equally true, however, that the FAA specifically states that arbitration clauses in "bills of lading of water carriers" are valid, irrevocable and enforceable, even though Congress must be presumed to have been aware of the general consensus as to the adhesionary nature of those bills of lading. This Court has stated "time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank* v. *Germain*, 112 S. Ct. 1146, 1149 (1992). But if, as petitioner contends, arbitration clauses in maritime bills of lading are unenforceable because such bills of lading are adhesionary, then the language of the FAA which says that those clauses are "valid, irrevocable, and enforceable" is meaningless. The FAA is more sensibly read, as the District Court below stated, as "a statutory determination that arbitration clauses in maritime bills of lading are not adhesional *per se* or generally invalid." Cert. Pet. App.B at 20a (emphasis in original). This result is consistent with case law enforcing preprinted form contracts.[14]

2. *A Contract Is Not Void Simply Because It Is Adhesionary.*

The FAA was intended to place arbitration agreements on the same footing as other contracts. *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213, 219 (1985) (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924)). Under general prin-

with a generous eye towards enforcing the parties' agreement to arbitrate. *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985).

[14] The district court in this case found that the petitioner had not demonstrated that the arbitration clause in the bill of lading was adhesional. Cert. Pet. App.B at 19a.

ciples of contract law, an adhesionary contract is valid absent some form of unfairness, undue oppression or unconscionability, particularly where, as here, the contract is between business entities. *Finkle and Ross* v. *A.G. Becker Paribas, Inc.*, 622 F.Supp. 1505, 1512 (S.D.N.Y. 1985); *see also M/V American Queen* v. *San Diego Marine Constr. Corp.*, 708 F.2d 1483, 1489 (9th Cir. 1983) (in commercial transaction between two business entities, court refuses to rewrite contract absent evidence that one party unfairly exploited a position of advantage). This principle has been applied in respect to arbitration provisions. *See, e.g., Stedor Enters., Ltd.* v. *Armtex, Inc.*, 947 F.2d 727 (4th Cir. 1991) (arbitration agreement enforceable despite being contained in preprinted contract which plaintiff failed to read).

Petitioner does not allege fraud, duress or unconscionability, and the facts in the record would not support any such allegation. Petitioner is the Spanish insurer of the Cargo. The consignee of the goods, Bacchus, is a major importer/wholesaler of fruit throughout New England and is familiar with the workings of international commerce and the consummation of international transactions. J.A. 39. Indeed, Bacchus was deeply involved in the overall transaction for the purchase and shipment of the Cargo, negotiated the charter party for the voyage in issue with Nichiro,[15] and had the opportunity to negotiate for bill of lading terms if it wished.

Moreover, this Court has explicitly declined to adopt the reasoning of a lower court holding that a non-negotiated forum-selection clause is never enforceable simply because it is not the subject of bargaining. *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585, 593 (1991). In *Shute*, this Court enforced a forum-selection clause contained in a cruise line's

[15] J.A. 69. That charter party contains a clause providing for arbitration in London. J.A. 71.

passage contract ticket despite its recognition that the contract was adhesionary in that plaintiff passengers did not negotiate the terms of the contract and did not have bargaining parity with the defendant cruise line. *Id.* Clearly, a contractual provision is not void simply because it is adhesionary, even in the absence of the FAA.

3. *The Savings Clause Contained In 9 U.S.C. § 2 Offers Petitioner No Grounds For Circumventing The Arbitration Clause.*

The savings clause of section 2 of the FAA allows a party to escape its agreement to arbitrate "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This clause permits avoidance of an arbitration agreement where that agreement is brought about by fraud or overwhelming economic power, or where Congress has clearly expressed its intent to preclude waiver of a judicial forum for the vindication of other federal statutory rights. *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985); *see also Finkle and Ross* v. *A.G. Becker Paribas, Inc.*, 622 F.Supp. 1505, 1512 (S.D.N.Y. 1985) (showing of unfairness, oppression or unconscionability necessary to make arbitration agreement unenforceable).

A party must be held to its agreement to arbitrate "unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi*, 473 U.S. at 628. If Congress had such an intention, it must be deduced from the text and legislative history of the relevant statute. *Id.* The burden is on the party opposing arbitration to demonstrate that Congress intended to preclude arbitration, or that arbitration conflicts with the underlying purpose of the other statute. *Rodriguez de Quijas* v. *Shearson/Am. Express Inc.*, 490 U.S. 477, 483 (1989); *Shearson/Am. Express Inc.* v. *McMahon*, 482 U.S. 220, 226-27 (1987).

a. *Arbitration Of COGSA Claims Is Permissible, Whether The Arbitral Forum Is Foreign Or Domestic.*

Petitioner opposes arbitration and argues that COGSA precludes waiver of a judicial forum only where *foreign* arbitration is concerned. However, the location of any arbitration proceeding becomes, on analysis, of substantially less importance than might appear. In respect to a claim under COGSA, or any other claim created or governed by statute, such a claim must either be subject to arbitration anywhere, or not subject to arbitration at all. If Congress has indicated that claims arising under a statute such as COGSA may only be resolved in a judicial forum, then such claims may not be arbitrated, and any agreement to arbitrate such a statutory claim is unenforceable as a result of the savings clause. If, however, Congress has not indicated an intent to make statutory claims nonarbitrable, then those statutory claims may be arbitrated anywhere.[16] The FAA provides no justification for restricting arbitration based on its location. A claim which is arbitrable can be arbitrated in Tokyo just as well as in Boston.

Analysis of the text and legislative history of COGSA fails to reveal any evidence of a Congressional intent to require COGSA claims to be resolved in a judicial forum.[17] Indeed,

[16] An agreement to arbitrate claims in an international forum of dubious safety could be avoided on the grounds that it would be unconscionable to force the parties to arbitrate in an unsafe location, and not because of anything intrinsically wrong with arbitration. The agreement in this case calls for arbitration in Tokyo, a forum as safe and stable as any in the United States.

[17] In recent years, this Court has declared that many important stautory claims are subject to arbitration. *See, e.g., Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (ADEA claims); *Rodriguez de Quijas* v. *Shearson/Am. Express Inc.*, 490 U.S. 477 (1989) (claims arising under the Securities Act of 1933); *Shearson/Am. Express Inc.* v. *McMahon*, 482 U.S. 220 (1987) (RICO claims); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (Sherman Act claims).

petitioner concedes that COGSA claims may be arbitrated in the United States.[18] Since COGSA claims can be arbitrated, the fact that this particular written provision calls for arbitration in Tokyo offers no basis for avoidance under the savings clause. The FAA makes no distinction between foreign and domestic arbitration.[19] Agreements to arbitrate must be deemed enforceable or not enforceable without regard to the location in which the arbitration is to take place.

b. *Uniform Enforcement Of Arbitration Clauses Is Consistent With The Underlying Purposes Of COGSA.*

Arbitration is consistent with the purposes of COGSA, because COGSA rights can effectively be vindicated in an arbitral forum. *See Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (quoting *Mitsubishi*, 473 U.S. at 637). Further, uniform enforcement of foreign arbitration clauses supports the policies underlying both COGSA and the FAA.

COGSA, as a codification of the internationally agreed-upon Hague Rules, was "part of an international effort to achieve uniformity and simplification of bills of lading used

[18] Relying on *State Establishment for Agric. Prod. Trading* v. *M/V Wesermunde*, 838 F.2d 1576 (11th Cir.), *cert. denied*, 488 U.S. 916 (1988), petitioner acknowledges that "arbitration as such does not violate COGSA." Petitioner's Brief at 19. Given petitioner's central argument that "*foreign* arbitration clauses [in maritime bills of lading] are invariably impermissible," Petitioner's Brief at 20 (emphasis added), it follows that any arbitration that would be permissible must occur in the United States.

[19] The legislative history of the FAA is replete with references to international transactions. For example, it was stated that the FAA "would go a long way towards harmonizing differences in connection with transactions not only as regards interstate commerce, but between citizens of this country and foreign countries." Arbitration of Interstate Commercial Disputes: Joint Hearing Before the Subcommittee of the Committees on the Judiciary, 68th Cong., 1st Sess., on S. 1005 and H.R. 646 (statement by Hon. John B. Kendrick, Senator from the State of Wyoming).

in international trade." *Union Ins. Soc'y of Canton, Ltd.* v. *S.S. Elikon*, 642 F.2d 721, 723 (4th Cir. 1981). It serves the further purpose of enhancing the negotiability of ocean bills of lading. *Id.* Thus COGSA, no less than the FAA, was designed to contribute to harmonizing trade among the nations of the world. Uniform enforcement of arbitration clauses, both foreign and domestic, advances that ultimate goal by demonstrating respect for international trading partners and avoiding protracted litigation about the enforceability of such clauses.

c. *The Alleged Illegality Of Foreign Arbitration Clauses Under COGSA Is Not A Ground For Avoiding Arbitration.*

In a related argument, petitioner asserts that the arbitration clause lessens the carrier's liability, thereby violating COGSA. This, according to petitioner, makes the arbitration clause illegal. Because illegality may be sufficient grounds for the avoidance of any contract, petitioner then leaps to the conclusion that the arbitration clause here is invalid.

However, the FAA is the controlling statute for the reasons set forth *supra*, at Sections A and B, and COGSA is therefore irrelevant to the enforceability of arbitration agreements in maritime bills of lading. The FAA specifically makes arbitration clauses in maritime bills of lading "valid, irrevocable, and enforceable." 9 U.S.C. § 2. Petitioner, by ignoring all of the language of the FAA which precedes the savings clause, argues essentially that the arbitration clause at issue here is illegal precisely because it *is* an arbitration clause in a maritime bill of lading — the very type of clause which the FAA unequivocally declares to be legal.

The conclusion that the FAA, by its explicit terms, controls with regard to foreign arbitration clauses in maritime bills of lading is compelled not only by the statute itself, which reflects the express will of Congress, but also by the decisions of this Court. The written arbitration provision contained in the Bill of Lading constitutes an enforceable agreement to arbitrate, and the savings clause of section 2 of the FAA provides no grounds for avoidance of that arbitration agreement. Consistent with the policy of the FAA, the arbitration clause in issue, as the First Circuit concluded, must be enforced.

D. PETITIONER'S RELIANCE ON FOREIGN JURISDICTION CLAUSE CASES IS MISPLACED.

Petitioner asserts that the arbitration clause in the Bill of Lading is unenforceable because it lessens the vessel owner's liability in contravention of section 3(8) of COGSA. 46 U.S.C. § 1303(8). As support for its position, petitioner relies heavily on cases which have held foreign jurisdiction and related foreign law clauses in maritime bills of lading to be unenforceable under COGSA. Petitioner's Brief at 14-17. This analytical approach is flawed, and it should be rejected.

1. *Arbitration Clauses Are Distinguishable From And Must Be Treated Differently Than Foreign Jurisdiction Clauses.*

Petitioner accurately notes that courts of appeals and district courts have held that foreign jurisdiction clauses in maritime bills of lading lessen the carrier's liability and are void under COGSA.[20] Petitioner's Brief at 14-16. Those courts have

[20] *See, e.g., Hughes Drilling Fluids* v. *M/V Luo Fu Shan*, 852 F.2d 840 (5th Cir. 1988), *cert. denied*, 489 U.S. 1033 (1989); *Conklin & Garret, Ltd.* v. *M/V Finnrose*, 826 F.2d 1441 (5th Cir. 1987); *Union Ins. Soc'y of Canton, Ltd.* v. *S.S. Elikon*, 642 F.2d 721 (4th Cir. 1981); *Indussa Corp.* v. *S.S.Ranborg*, 377 F.2d 200 (2d Cir. 1967); *Underwriters at Lloyd's of London* v. *M/V Steir*, 773 F. Supp. 523 (D.P.R. 1991).

construed COGSA's "lessening" provision broadly, and have found that bill of lading clauses requiring litigation of cargo claims in a foreign court deprive the cargo claimant of the assurance that the trial court will apply COGSA "in the same way as would an American tribunal subject to the uniform control of the Supreme Court . . . ." *Indussa Corp.* v. *S.S. Ranborg*, 377 F.2d 200, 204 (2d Cir. 1967); *accord*, *Conklin & Garret, Ltd.* v. *M/V Finnrose*, 826 F.2d 1441, 1443 (5th Cir. 1987). In some cases, courts have also concluded that the expense and inconvenience of litigating cargo claims in foreign courts make it more likely that cargo interests will accept less in settlement than they would if their claims were subject to litigation in the United States. *Indussa*, 377 F.2d at 203; *Underwriters at Lloyd's of London* v. *M/V Steir*, 773 F.Supp. 523, 527 (D.P.R. 1991).

Petitioner argues that foreign arbitration clauses in maritime bills of lading are not distinguishable in any relevant respect from foreign jurisdiction clauses and that the reasoning of the courts which have held foreign jurisdiction clauses to be unenforceable under COGSA applies with equal force to foreign arbitration clauses. Petitioner's Brief at 17-22. Petitioner is wrong on both counts.

a. *The FAA Requires Enforcement Of Foreign Arbitration Clauses, While No Federal Statute Requires Enforcement Of Foreign Jurisdiction Clauses.*

The first critical flaw in petitioner's argument is that it disregards entirely the impact of the FAA. The FAA applies expressly to maritime bills of lading, 9 U.S.C. § 1, and it specifically provides that written arbitration provisions contained in those bills of lading are valid, irrevocable and enforceable. 9 U.S.C. § 2. Congress has not, however, enacted an analogous statute requiring the enforcement of foreign jurisdiction clauses in bills of lading. The application of the FAA to maritime bills of lading distinguishes this case fundamentally from the foreign jurisdiction cases relied upon by petitioner and renders those cases inapposite. In *Indussa*, the leading case on foreign jurisdiction clauses in maritime bills of lading, Judge Friendly recognized this distinction and noted that, "[i]f there be any inconsistency between the [FAA and COGSA], presumably the [FAA] would prevail . . . ." 377 F.2d at 204 n.4.

b. *Litigation And Arbitration Are Fundamentally Different Forms Of Dispute Resolution.*

The second critical flaw in petitioner's argument is that it ignores the fundamental differences between litigation and arbitration.[21] The argument made by petitioner, if accepted, leads directly to the conclusion that *all* arbitration clauses — foreign and domestic — in maritime bills of lading to which COGSA applies by its own force lessen the carrier's liability under COGSA and are unenforceable. Such a result, though plainly inconsistent with any reasonable reading of the FAA, might be required if the reasoning of the courts which have invalidated foreign jurisdiction clauses were accepted and applied to arbitration clauses in maritime bills of lading.

In *Indussa*, the court concluded that foreign jurisdiction clauses in maritime bills of lading are unenforceable, in part because they constitute an actual or a potential lessening of

[21] Litigation in the United States is conducted in accordance with formal rules governing procedural and evidentiary matters, and with substantive law applied by judges whose decisions are reviewable by appellate courts. Arbitration is intended to be a less formal, less costly, and less time-consuming method of resolving private commercial disputes. In litigation, the judge is expected to have expertise in the law and to apply legal rules with precision. The same is not expected of an arbitrator, and an error of law by an arbitrator which would be sufficient to require reversal of a decision if committed by a judge will ordinarily not be sufficient to require vacating an arbitration award. *Ainsworth* v. *Skurnick*, 960 F.2d 939, 940 (11th Cir. 1992), *cert. denied*, -- U.S. --, 113 S.Ct. 1269 (1993).

the carrier's liability by requiring the presentation of a cargo claim in a foreign forum with no assurance that the judge there will apply COGSA "in the same way as would an American tribunal subject to the uniform control of the Supreme Court . . . ." *Indussa*, 377 F.2d. at 203-204; *accord*, *Conklin*, 826 F.2d at 1442-1444; *Union Ins. Soc'y of Canton, Ltd.*, 642 F.2d at 723-725. But the parties to an arbitration proceeding — whether it is conducted in the United States or in a foreign country — also lack assurance that the arbitrators will apply the law as would an American court. Further, a simple error in the application of law by the arbitrators ordinarily will not provide a basis for vacating an award.[22] This is true with respect to *all* arbitration, whether it is conducted in Boston, London or Tokyo.

Thus, if the reasoning of *Indussa* applies to arbitration clauses in maritime bills of lading constituting contracts of carriage to or from the United States, no arbitration clause in any of these bills of lading, foreign or domestic, would be enforceable. Such a result conflicts directly with the unequivocal language of the FAA, which provides that written arbitration provisions in "bills of lading of water carriers" shall be "valid, irrevocable, and enforceable . . . ." 9 U.S.C. §§ 1, 2. Petitioner acknowledges that this result is untenable by accepting the Eleventh Circuit's view that "arbitration as such does not violate COGSA, 'in light of Congress' encouragement of arbitration by its enactment of the [FAA] . . . .'" Petitioner's Brief at 19 (quoting *State Establishment for Agric. Prod. Trading* v. *M/V Wesermunde*, 838 F.2d 1576, 1581 (11th Cir.), *cert. denied*, 488 U.S. 916 (1988)).[23] This

[22] Petitioner acknowledges this distinction between arbitration and litigation. Petitioner's Brief at 20 n.16. Petitioner also contends, without citation to any authority, that vacating arbitrators' awards "would be even more difficult in the case of awards issued abroad." *Id.* No support exists for this assertion.

[23] In *Wesermunde*, the court indicated that a bill of lading clause requiring arbitration in the United States would be enforceable "in light of Congress' encouragement of arbitration by its enactment of the [FAA]," but that a clause "requiring arbitration in a *foreign* country that has no connection with either the performance of the bill of lading contract or the making of the bill of lading contract is a provision that would conflict with COGSA's general purpose of not allowing carriers to lessen their risk of liability." 838 F.2d at 1581 (emphasis in original). The distinction drawn by the court between domestic and foreign arbitration may have been intended to soften the effect of its ruling against foreign arbitration clauses, but it is not supported by the plain language of the FAA.

concession is compelled by the plain meaning of the language of the FAA and the decisions of this Court holding that the FAA must be rigorously enforced. *Mitsubishi*, 473 U.S. at 625-626; *Moses H. Cone Memorial Hosp.*, 460 U.S. at 24. The case at bar involves an arbitration clause, not a foreign jurisdiction clause, and the reasoning of *Indussa* and its progeny simply does not apply.

Petitioner's attempt to equate foreign jurisdiction clauses with foreign arbitration clauses must be rejected. Litigation and arbitration are distinctly different forms of dispute resolution, and clauses in maritime bills of lading addressing each must be treated differently. Congress has done so by enacting the FAA, and there is nothing in the language of that statute to support a contention that it does not apply to the bill of lading in issue. Indeed, the court in *Indussa* recognized the distinction between foreign jurisdiction and foreign arbitration clauses and made it clear that its "ruling does not touch the question of arbitration clauses in bills of lading . . . ." *Indussa*, 377 F.2d at 204 n 4.

The foreign jurisdiction clause cases are inapposite, and petitioner's reliance on them is misplaced. The FAA is controlling and requires that the arbitration clause in the Bill of Lading be enforced.

E. THE REFERENCE TO JAPANESE LAW IN THE BILL OF LADING DOES NOT RENDER THE ARBITRATION CLAUSE UNENFORCEABLE.

Petitioner's argument that the reference to Japanese law in the Bill of Lading invalidates the arbitration clause is without merit.

Although the Bill of Lading in issue contains a provision providing for the application of Japanese law, J.A. 49 at ¶3 (1), it also provides for the application of COGSA in certain circumstances. J.A. 56 ¶19 (the "Local Clause"). Thus, at this interlocutory stage, it cannot be said with certainty that Japanese law will be applied by the arbitrators. For the reasons discussed below, however, the enforceability of the arbitration provision should not turn on whether COGSA or Japanese law will be applied.

A comparison of COGSA and the Japanese Hague Rules[24] demonstrates that the two statutes are substantively the same in all relevant respects. For example, both COGSA and the Japanese Hague Rules require that the carrier exercise due care with respect to cargo. 46 U.S.C. § 1303(2); Japanese Hague Rules, Article 3(1), 4(1), J.A. 112, 113.[25] Similarly,

[24] The Japanese codification of the Hague Rules is substantially the same as COGSA, which is the American codification of the Hague Rules. T. Schoenbaum, *Law of Admiralty*, § 9-13 at 314 (1987) (Hague Rules were incorporated into American law through enactment of COGSA). The Hague Rules and the Japanese Hague Rules are set forth in the Joint Appendix. J.A. 89-108 (Hague Rules); J.A. 109-120 (Japanese Hague Rules).

[25] Petitioner's argument to the effect that, under the Japanese Hague Rules, the carrier would have available a defense based on the acts or omissions of the stevedore (who was hired by the shipper, Galaxie) which would *not* be available under COGSA is plainly wrong. Petitioner's Brief at 21. COGSA specifically provides for such a defense. 46 U.S.C. §1304(2)(i) ("(2) neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from . . . (i) Act or omission of the shipper or owner of the goods, his agent or representative."); *see Associated Metals & Minerals Corp. v. M/V Artkis Sky*, 978 F.2d 47 (2d Cir. 1992).

both impose liability on the carrier for negligent failure to make the vessel seaworthy and to make the holds fit and suitable for the carriage of goods. 46 U.S.C. § 1304(1); Japanese Hague Rules, Article 5, J.A. 114. The statutes evolve from the same source, the Hague Rules, and reflect each nation's commitment to the substantive principles embodied in that international convention. Thus, reliance by the arbitrators on one of these statutes rather than the other will not result in application of a different legal standard.

Further, by focusing on the reference to Japanese law in the Bill of Lading, petitioner again fails to appreciate the significance of the fact that the clause in issue calls for arbitration, not litigation. Arbitrators are not judges, and they are not expected to apply the law with the same exactitude as would a court in the United States. This is a feature, not a shortcoming, of arbitration. In the present case, this feature is of even less consequence than it might otherwise be, because the statutes in question, COGSA and the Japanese Hague Rules, are substantively the same in all relevant respects. The enforceability of the arbitration provision in issue does not turn on the title of the statute to be applied by the arbitrator. The FAA applies to this Bill of Lading and to this arbitration provision, and it requires that the arbitration provision be enforced.

F. THE *WESERMUNDE* DECISION IS WRONG.

State Establishment for Agric. Prod. Trading v. *M/V Wesermunde*, 838 F.2d 1576 (11th Cir.), *cert. denied*, 488 U.S. 916 (1988), involved a shipment of eggs from Tampa, Florida to Aqaba, Jordan on board the M/V WESERMUNDE. Prior to delivery in Jordan, the cargo was destroyed by fire. State Establishment for Agricultural Product Trading ("State Establishment"), an agency of the government of Iraq, in its capacity as the owner of the cargo, commenced a "multi-million dollar" action against the vessel and her owners,

managers and insurer, in the United States District Court for the Middle District of Florida. *Wesermunde*, 838 F.2d at 1578. At the time of the loss, the vessel was operating under a charter which contained a provision requiring all disputes arising thereunder to be settled by arbitration in London. *Id.* The bill of lading for the shipment incorporated by reference both the terms of the charter party and COGSA. *Id.* at 1580.

The defendants in *Wesermunde* moved for a stay of the action pending arbitration, and the district court allowed the motion. *Id.* at 1578-79. The court of appeals reversed. *Id.* at 1583. In the section of the opinion most relevant to the issue presently under review, the court of appeals concluded that a provision in a maritime bill of lading to which COGSA applies by its own force requiring "arbitration in a *foreign* country that has no connection with either the performance ... or the making of the bill of lading contract ... would conflict with COGSA's general purpose of not allowing carriers to lessen their risk of liability" and would, as a result, be "void and utterly without effect." *Id.* at 1581 (emphasis in original). The conclusion is wrong, and the First Circuit was correct in rejecting it.

The opinion in *Wesermunde* contains no meaningful analysis of the FAA, the application of the FAA to foreign arbitration clauses, the conflict between the FAA and COGSA, or the rules of statutory construction which should be applied to resolve the conflict. Instead, the court proceeds on the incorrect assumption that COGSA is controlling with respect to foreign arbitration clauses in maritime bills of lading. *Id.* at 1580-1581. As discussed *supra* at Sections A and B, this fundamental premise is incorrect. The FAA applies to foreign arbitration clauses in maritime bills of lading, and it removes such clauses from the grasp of COGSA.

Reliance on the wrong statute led the court in *Wesermunde* to apply the wrong legal standard. It considered the crucial

issue to be whether the arbitration clause in issue constituted a lessening of the carrier's liability under COGSA.[26] It asked the wrong question and, by doing so, reached the wrong result.

The FAA governs and it, not COGSA, establishes the legal standards to be applied in determining the enforceability of arbitration clauses in maritime bills of lading. The *Wesermunde* court's requirement that there be a "connection" between the foreign arbitration forum and the making or performance of the bill of lading contract as a prerequisite to the enforceability of an arbitration clause, 838 F.2d at 1581, finds no support in, and is inconsistent with, the plain language of the FAA. The FAA provides that arbitration agreements in maritime bills of lading are valid, irrevocable, and enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The absence of a connection between the arbitration forum and the making or performance of the bill of lading contract is not one of those grounds. *See* discussion of the grounds for avoidance of arbitration provisions, *supra* at Section C. The *Wesermunde* court's analysis of the issue was wrong from the start, and it should be rejected.

G. THE *INDUSSA* COURT INCORRECTLY CONSTRUED AND APPLIED SECTION 3(8) OF COGSA.

Petitioner asserts that the arbitration clause in the Bill of Lading violates section 3(8) of COGSA because enforcement

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[26] The court relied on *Indussa*. *Wesermunde*, 838 F.2d at 1581. In doing so, it failed to heed the Second Circuit's admonition that the ruling in *Indussa* "does not touch the question of arbitration clauses . . . ." *Indussa*, 377 F.2d at 204 n.4. In addition, the court in *Wesermunde* does not address, or even acknowledge, Judge Friendly's view that the FAA would prevail over COGSA in the event of a conflict between the two statutes. *Id.*

of the clause would result in a "lessening" of the carrier's liability "otherwise than as provided in" COGSA. Petitioner relies on *Indussa* to establish the meaning of the word "lessening" as it is used in COGSA.[27] For the reasons discussed below, respondent submits that the court in *Indussa* construed "lessening" too broadly and that, properly construed, section 3(8) of COGSA does not prohibit enforcement of the foreign arbitration clause in the Bill of Lading.

In *Indussa*, the Court of Appeals specifically rejected a case-by-case approach to the determination of whether a provision in a maritime bill of lading requiring suit in a foreign jurisdiction constituted a lessening of the carrier's liability under section 3(8) of COGSA. *Indussa*, 377 F.2d at 202. Instead, the court applied a bright-line rule, the effect of which was to "invalidate any contractual provision in a bill of lading for a shipment to or from the United States which would prevent cargo able to obtain jurisdiction over a carrier in an American court from having that court entertain the suit and apply the substantive rules Congress has prescribed." *Id.* at 204.[28] The court construed the term "lessening" very broadly and concluded that foreign jurisdiction clauses are invalid *per se* for two reasons. First, they place practical impediments in the way of cargo claimants and thereby make it more likely that such claimants will abandon their claims or settle them for lower amounts than they would if permitted to sue in an

[27] As discussed above, respondent's basic argument in the present case is that the FAA controls with respect to the enforceability of the arbitration clause contained in the Bill of Lading, and therefore COGSA does not apply to that clause. If respondent's position on this issue is accepted by the Court, then the issue of "lessening" under COGSA is irrelevant and need not be addressed. If, however, the Court rejects respondent's argument concerning the primacy of the FAA, then the meaning of the term "lessening" as it is used in COGSA becomes relevant.

[28] As discussed previously, the footnote to this statement makes it clear that the court did not intend the rule of preclusion to apply to arbitration clauses subject to the FAA. *Indussa*, 377 F.2d at 204 n.4.

American court, particularly when the claims are "small." *Id.* at 203. Second, such clauses were seen as depriving cargo claimants of the assurance that the foreign tribunal would apply COGSA in the same way as would an American court. *Id.* at 203-204. The court's expansive reading of the "lessening" provision is not supported by the text of the statute or by the decisions of this Court.

When determining the meaning of a statute, courts must first look to the language of the statute and apply to that text the common meaning of the words used. *See Old Colony R. Co.* v. *Commissioner of Internal Revenue*, 284 U.S. 552, 560 (1932). Section 3(8) of COGSA provides that any clause in a contract of carriage "lessening" a carrier's or a ship's "liability otherwise than as provided" in COGSA "shall be null and void and of no effect." 46 U.S.C. § 1303(8). The liabilities, responsibilities, rights and immunities of the carrier and the ship are set forth in sections 3 and 4 of COGSA. The carrier's responsibilities and liabilities with respect to the seaworthiness of the vessel and the loading, handling, stowage, care and discharge of the cargo are set forth in section 3. 46 U.S.C. § 1303. The circumstances under which the carrier shall not be responsible for loss or damage to cargo, and the monetary limits of the carrier's liability in certain specified instances, are set forth in section 4. 46 U.S.C. § 1304.

It is submitted that the "lessening" language of section 3(8) refers specifically to the carrier's "liability" under COGSA and should be read to apply specifically to, and only to, those liabilities described in the other sections of COGSA. Such a reading gives full effect to the lessening provision and prohibits, for example, provisions in bills of lading which purport to relieve a carrier of its statutory duty to exercise due diligence to make the vessel seaworthy, 46 U.S.C. § 1303(1), or to load, stow and discharge the cargo properly and carefully. 46 U.S.C. § 1303(2). Such a construction of the lessening provision also prohibits the enforcement of bill of lading pro-

visions purporting to shorten the period of time within which suit must be brought to less than one year, 46 U.S.C. § 1303(6), or to reduce the carrier's liability to less than $500 per package, 46 U.S.C. § 1304(5). This is the common-sense meaning of the lessening prohibition contained in section 3(8).

In *Indussa*, the court construed the word "lessening" to apply to issues beyond the liabilities of the carrier and the vessel as described in the statute. In doing so, the court relied on this Court's decision in *Knott* v. *Botany Worsted Mills*, 179 U.S. 69 (1900). *Indussa*, 377 F.2d at 203. *Knott*, however, does not support the court's expansive reading of the lessening provision of COGSA. In *Knott*, this Court held that the Harter Act nullified a bill of lading provision which purported to exempt the carrier from liability for its own negligence in respect to the stowage of cargo. The bill of lading in issue in *Knott* contained a provision providing that the contract was governed by the law of the vessel's flag state, England. The Court indicated that the exculpatory clause in the bill of lading would be enforceable under the laws of England. *Knott*, 179 U.S. at 71-72. In these circumstances, the Court held that the bill of lading clause and the provision requiring the application of the law of the flag state were both nullified by the Harter Act, which specifically prohibited clauses which relieved the carrier of liability for damage arising from its own negligence in the loading, stowage and care of the cargo. *Id.* at 77.

Insofar as the court in *Indussa* relied on *Knott* as support for a bright-line rule precluding the enforcement of all foreign jurisdiction clauses in maritime bills of lading, that reliance was misplaced. The Court in *Knott* simply held that provisions in a bill of lading which would permit the carrier to avoid liability for its own negligence contravened a specific provision in the Harter Act. The decision in *Knott* is entirely consistent with the more narrow construction of the lessening provision proposed by respondent in the present action. That

construction of section 3(8) of COGSA would require that an exculpatory provision such as the one in issue in *Knott* be held to be unenforceable because it would result in a lessening of the carrier's liability by relieving it of the duty expressly stated in COGSA to load, stow, and care for the cargo "properly and carefully." 46 U.S.C. § 1303(2).[29]

The lessening provision of section 3(8) should be construed to apply to those responsibilities and liabilities of the carrier and the vessel which are specified plainly in COGSA, such as the duty to load, stow and handle the cargo properly and carefully, and to preclude the enforcement of a bill of lading provision which, by its terms, limits those responsibilities and liabilities. Construed in this manner, the lessening provision of COGSA does not prohibit the enforcement of the arbitration clause in the Bill of Lading.

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[29] In *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585 (1991), this Court upheld the validity of a forum-selection clause in a cruise line's passenger ticket requiring that suits against the carrier be brought in Florida. *Shute*, 499 U.S. at 595. The Court rejected the argument that the forum-selection clause was unenforceable because it violated 46 U.S.C. App. § 183c, which prohibits the owners of passenger vessels from inserting into the contract of carriage any provision which would "lessen . . . the right of any claimant to a trial by court of competent jurisdiction on the question of liability for . . . [personal] injury . . . ." *Id.* at 595-596. Respondents filed suit in Washington. Noting that a court in Florida would be a "court of competent jurisdiction" within the meaning of the statute, the Court concluded that the forum-selection clause did "not take away respondents' right to 'a trial by [a] court of competent jurisdiction' and thereby contravene the explicit proscription of § 183c." *Id.* at 596. The Court also rejected the argument that enforcement of the forum-selection clause would cause the passengers "unreasonable hardship in asserting their rights and therefore violat[e] Congress' intended goal in enacting § 183c." *Id.* Although *Shute* is distinguishable from the present case in that it did not involve COGSA and the clause in issue provided for a domestic judicial forum, the Court's straightforward approach to the construction and application of the lessening provision of the statute under review is consistent with that proposed by respondent in the present case.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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No. 94-623

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

VIMAR SEGUROS Y REASEGUROS, S.A.,

Petitioner,

—v.—

M/V SKY REEFER, her Engines, etc., and M.H. MARITIMA, S.A.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONER'S REPLY BRIEF

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE PETITIONER

PRELIMINARY STATEMENT

Respondents defend the court of appeals' decision in this case by embracing all of its principal errors. Like the court below, respondents assume that COGSA and the FAA are in "conflict," and they therefore invoke maxims of statutory construction to select a winner. Like the court below, respondents cast their lot with the FAA because, in their view, it is more "specific" and was later enacted. And most fundamentally, respondents, like the court below, ignore the text and policies of COGSA, which cannot be squared with a foreign

arbitration clause—particularly one, as in this case, that requires the application of foreign law, not COGSA.

ARGUMENT

A. Foreign Arbitration Clauses Lessen The Carrier's Liability In Violation Of Section 3(8) Of COGSA

1. In one respect, respondents depart from the court of appeals' decision. Unlike the court of appeals—which conceded that "absent the FAA, COGSA might operate to nullify foreign arbitration clauses in bills of lading" (Pet. App. 10a n.5)—respondents contend (Resp. Br. 35-39) that section 3(8) does not cover foreign arbitration clauses at all. In their view, "the 'lessening' language of section 3(8) refers specifically to the carrier's 'liability' under COGSA and should be read to apply specifically to, and only to, those liabilities described in the other sections of COGSA" (Resp. Br. 37). In particular, respondents add, "[t]he lessening provision of section 3(8) should be construed to apply to * * * [duties] such as the duty to load, stow and handle the cargo properly and carefully, and to preclude the enforcement of a bill-of-lading provision which, by its terms, limits those responsibilities and liabilities" (*id.* 39).

That is true, but irrelevant. We fully agree that section 3(8) applies to those "responsibilities and liabilities * * * which are specified plainly in COGSA" (Resp. Br. 39); after all, that is exactly what the statute says. See 46 U.S.C. 1303(8). The question, however, is not what kinds of liabilities "lessening" *applies to*; the question is what "lessening" *means*, and how broadly it should be construed. On that question, respondents venture no view at all. Apparently, respondents would limit the term "lessening" only to clauses that "relieve," "shorten," or "reduce" the substantive obligations imposed on carriers in sections 3 and 4 of COGSA (Resp. Br. 37-38). But "lessening" sweeps much more broadly, including *any* means by which an object is made "less in size, quantity, scope,

amount, etc." *The Oxford English Dictionary* (1971). Thus, to "lessen" liability encompasses any provision by which liability is made more difficult or costly to establish—including, as here, by coupling enormous transaction costs with the application of foreign law.[1]

2. That is certainly the view this Court took in *Knott v. Botany Worsted Mills*, 179 U.S. 69 (1900). As we explained in our opening brief (at 13-14), the Court in *Knott*, applying the nearly identical language in section 1 of the Harter Act, 46 U.S.C. 190, the precursor to section 3(8), invalidated a bill-of-lading clause that purported to require the application of foreign law to bill-of-lading claims. The Court held that the foreign-law clause was inconsistent with the Act, which prohibited any bill-of-lading clause that "relieved" a carrier from liability.[2] The lesson of *Knott* is clear: liability is "relieved" (and, thus, necessarily is "lessened") by any bill-of-lading clause that displaces (or threatens to displace) the application of COGSA rules.

Respondents overlook this aspect of *Knott*, treating the case as if it "simply held that provisions in a bill of lading which would permit the carrier to avoid liability for its own negligence contravened a specific provision in the Harter Act" (Resp. Br. 38). But that is not all the case held: in addition to invalidating the exculpatory negligence clause, the Court explicitly struck down the foreign-law clause. If respondents were correct that the words "relieving" and "lessening" in

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[1] Accordingly, " '[i]t is *entirely unrealistic* to look to an obligation to sue overseas as not 'lessening' the liability of the carrier' " *Conklin & Garrett Ltd. v. M/V Finnrose*, 826 F.2d 1441, 1444 (5th Cir. 1987) (quoting G. Gilmore and C. Black, Jr., *The Law of Admiralty* 146 n.23 (2d ed. 1975) (emphasis added)—and the same holds true for arbitration overseas.

[2] And as the leading treatise observes, the enacting section of COGSA, 46 U.S.C. 1300, prohibits foreign law clauses (and likewise foreign forum selection clauses that incorporate foreign law clauses) "just as clearly as or more clearly than Harter." G. Gilmore & C. Black, Jr., *The Law of Admiralty* 146 (2d ed. 1975). See also 46 U.S.C. 1312.

section 3(8) cover only clauses that directly alter liability rules, the Court could not, and would not, have struck down the foreign-law provision in *Knott*. But it did.[3]

3. As we explained in our opening brief (at 14-17), the courts of appeals, applying the principles in *Knott*, have uniformly invalidated not only foreign-law clauses, but also foreign forum selection clauses in maritime bills of lading. Taken together, these cases reflect a sensible, practical construction of the term "lessening" in section 3(8) of COGSA—a construction that extends equally to (and equally prohibits) foreign arbitration clauses.[4]

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[3] In other contexts, the Court has ruled that venue restrictions imposed by carriers represent prohibited exemptions from liability. See *Boyd v. Grand Trunk Western R. Co.*, 338 U.S. 263, 265 (1949) ("We hold that petitioner's right to bring the suit in any eligible forum is a right of sufficient substantiality to be included within the Congressional mandate of § 5 of the [Federal Employers'] Liability Act: 'Any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void * * *.' The contract before us [restricting the choice of venue for an action based on FELA] is therefore void.").

[4] The legislative history of COGSA (see *Uniform Ocean Bills of Lading—Hague Rules*, H.R.Rep. No. 2218, 74th Cong., 2d Sess. (1936)) does not suggest that Congress intended to leave COGSA at the mercy of the ocean carriers. The domestic legislative history on which *amici* mainly rely consists of bills introduced to amend the Harter Act over twenty years before COGSA was enacted. Amici Br. at 18 n.9. These bills do not speak to the enactment of COGSA in 1936 and certainly do not suggest that Congress intended foreign forum selection clauses to be beyond COGSA's reach (no matter what the impact such clauses might have on a bill-of-lading holder's COGSA rights).

Nor does the legislative history of COGSA's enactment in 1936 suggest that Congress, by not modeling COGSA on some other statute that preceded the Hague Rules (such as the prior Canadian act), intended that 46 U.S.C. 1300, 1303(8) and 1312 *not* apply to foreign forum selection clauses that have the undoubted practical effect of "lessening" the carrier's liability (ousting COGSA altogether in the process). Such unfounded speculation concerning congressional intent was the primary basis for the decision in *Wm. H. Muller & Co. v. Swedish American Line*

Respondents acknowledge that "courts of appeals and district courts have held that foreign jurisdiction clauses in maritime bills of lading lessen the carrier's liability and are void under COGSA" (Resp. Br. 27). They contend, however, that, for two reasons, the logic of those cases does not extend to foreign arbitration clauses. First, they note that, unlike the case with forum selection clauses, there is a federal statute—the FAA—which specifically provides for the enforceability of foreign arbitration clauses (Resp. Br. 28). But respondents misunderstand the point. We rely on *Knott* and the forum selection cases to underscore the proposition that *section 3(8) of COGSA* prohibits foreign arbitration clauses. Whether the FAA separately requires enforcement of such provisions (it does not) has no bearing on whether COGSA, standing alone, reaches foreign arbitration clauses.

Second, respondents maintain, in essence, that the forum selection cases prove too much. They note that in *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200 (2d Cir. 1967), Judge Friendly concluded that it would "lessen" liability to remit a party to a foreign forum in which there was "no assurance that the judge there will apply COGSA 'in the same way as would an American tribunal subject to the uniform control of

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Ltd., 224 F.2d 806, 807 (2d Cir.), *cert. denied*, 350 U.S. 903 (1955), which the Second Circuit expressly rejected in *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200 (2d Cir. 1967) (*en banc*) (relying, *inter alia*, on *Knott* and 46 U.S.C. 1300, 1303(8) and 1312).

The history of the Hague Rules also does not speak to the enactment of COGSA in 1936 (particularly in light of 46 U.S.C. 1300 and 1312, which have no counterpart in the Hague Rules). In addition, *amici* are wrong in asserting that under the Hague Rules forum selection clauses are merely "procedural" and therefore outside the scope of article 3(8) of the Hague Rules (Amici Br. at 17). This "narrow" construction of article 3(8) of the Hague Rules was rejected by the House of Lords in *The Morviken*, [1983] 1 Lloyd's Law Rep. 1, 6-7 (the "only sensible meaning to be given to the descriptions of provisions in contracts of carriage which are rendered 'null and void and of no effect' by [article 3(8)] is one which would embrace every provision in a contract which, if it were applied, would have the effect of lessening the carrier's liability otherwise than as provided in the rules").

the Supreme Court' " (Resp. Br. 28 (quoting *Indussa*, 377 F.2d at 203-204)). But that risk, respondents assert, is true in *any* arbitral forum, foreign or domestic. Accordingly, they reason, if this line of cases were applicable, *all* arbitration would be prohibited in COGSA cases (Resp. Br. 29-30).

But that is not so. American arbitrators, first and foremost, are governed by American decisional law. They are required to apply settled American legal principles in resolving disputes governed by United States law. True, their application of United States law may, in particular cases, depart from prevailing judicial interpretations. But the risk of such departures is surely more modest in the case of arbitration in the United States than in the case of arbitration overseas. After all, foreign arbitration poses more than simply the risk that foreign arbitrators will apply COGSA in a different way; it risks the prospect (as often as not the virtual certainty) that arbitrators will not apply COGSA at all, but will instead apply foreign law and foreign procedures—all in a remote and costly jurisdiction that may be substantially unconnected with the merits of the underlying dispute.[5]

Indeed, those are precisely the circumstances in this case. The bill of lading explicitly provides that the contract "shall be governed by Japanese law;" COGSA comes into play only if "it shall be adjudged that the Japanese law does not govern this Bill of Lading" (J.A. 49, 56).[6] As we explained in our

[5] Respondents not only concede the added risks of arbitration, in which an "error in the application of law by the arbitrators ordinarily will not provide a basis for vacating an award" (Resp. Br. at 30), but also identify as a "feature" of arbitration that foreign arbitrators would "not be expected to apply the law with the same exactitude as would a court in the United States" (*id.* at 33). It follows that foreign arbitration clauses "lessen" the liability of ocean carriers *more so* than foreign suit clauses.

[6] Respondents state somewhat elliptically that the bill of lading "provides for the application of COGSA in certain circumstances" (Resp. Br. 32). The "circumstance" referred to is an "adjud[ication]" that Japanese law does not otherwise control. There has been no such adjudication in this case.

opening brief (at 21-22 & n.19), Japanese law is materially different from COGSA.[7] But even if it were not clearly different, a fundamental purpose of COGSA is to spare consignees the guesswork—to "relieve" them "of the necessity of closely examining all bills of lading to determine the exceptions contained therein * * *." *Uniform Ocean Bills of Lading—Hague Rules*, H.R.Rep. No. 2218, 74th Cong., 2d Sess. 7 (1936).[8]

In any event, the court below concluded that the FAA trumps COGSA *without regard* to whether the foreign arbitrators might apply foreign law—even a materially *different* foreign law—in the arbitral forum. In the court of appeals' view, foreign arbitration clauses are exempt from COGSA, even if the foreign arbitrators would likely ignore COGSA altogether. That conclusion cannot be squared with this Court's statement in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985), that

[7] A hallmark of COGSA (Pet. Br. at 21) is that the duty imposed on the carrier in section 3(2) to "properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried" is non-delegable. 46 U.S.C. 1303(2). The comparable provision of the Japanese Hague Rules, Article 3(1) (J.A. 112), does not render the carrier's obligation to load and stow the cargo non-delegable and is therefore directly contrary to section 3(2) of COGSA. Respondents' reliance on section 4(2)(i) of COGSA, 46 U.S.C. 1304(2)(i) (see Resp. Br. at 32 n.25), is misplaced because that exception does not relieve the carrier of the overriding, non-delegable obligation to "properly and carefully load [and] stow" the cargo which is set forth in section 3(2) of COGSA. See G. Gilmore & C. Black, Jr., *The Law of Admiralty* 169-173 (2d ed. 1975).

[8] COGSA also prevents carrier overreaching in the form of boilerplate bill-of-lading clauses that are imposed in foreign ports on shippers (and hence on the American consignees to whom such bills of lading are negotiated incident to the sale of goods), who frequently lack the wherewithal to reject the carrier's bill-of-lading terms (or have no alternative but to acquiesce to such terms). COGSA thereby gives American businessmen comfort that the contract of carriage—which is essential to the purchase and sale of goods abroad—is enforceable in the United States according to COGSA rules (regardless of the boilerplate terms in the bill of lading issued to the shipper at the loading port).

"in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies * * *, we would have little hesitation in condemning the agreement as against public policy."

The short of the matter is this. Although arbitration, as such, "is consistent with the purposes of COGSA" (Resp. Br. 25), there is a world of difference between domestic arbitration under COGSA rules and Supreme Court precedent, and arbitration in a distant and unrelated foreign forum, under foreign law and procedures. Thus, the Eleventh Circuit was entirely correct when it held, in *State Establishment for Agricultural Product Trading v. M/V Wesermunde*, 838 F.2d 1576, 1581 (11th Cir.), *cert. denied*, 488 U.S. 916 (1988), that "[w]hile * * * arbitration in and of itself is [not] *per se* violative of COGSA's provisions, especially in light of Congress' encouragement of arbitration by its enactment of the [FAA], * * * a provision requiring arbitration in a *foreign* country that has no connection with the performance of the bill of lading contract or the making of the bill of lading contract is a provision that would conflict with COGSA's general purpose of not allowing carriers to lessen their risk of liability" (emphasis in the original).

4. We note, finally, that respondents barely even address our contention that foreign arbitration clauses cannot be squared with the *purposes* of COGSA. As we explained in our opening brief (at 22-25), COGSA was designed to promote uniformity in bills of lading, to preclude carriers from evading their COGSA duties, and to afford shippers and consignees certainty in maritime transactions "to or from ports of the United States" (46 U.S.C. 1300). Foreign arbitration clauses deprive cargo owners of those statutory benefits. Furthermore, respondents (and *amici*) do not deny that if foreign arbitration-and-law clauses were enforceable, they would soon be found in virtually every carrier's bill of lading; in

short order, COGSA itself would become entirely "null and void and of no effect" (46 U.S.C. 1303(8)).[9]

B. The FAA Does Not Conflict With COGSA

Admittedly, even if section 3(8) of COGSA would otherwise prohibit foreign arbitration clauses, Congress *could* supersede that provision by enacting another, inconsistent statute that clearly requires that such clauses be enforced. Respondents believe that section 2 of the FAA does just that. As they put it themselves, "[r]espondents' basic argument in the present case is that the FAA controls with respect to the enforceability of the arbitration clause contained in the Bill of Lading, and therefore COGSA does not apply to that clause" (Resp. Br. at 36 n.27). Like the court below, respondents regard the two statutes as conflicting, and they therefore rely on interpretive principles to resolve that perceived conflict. See *id.* at 15-19.

But respondents do not dispute the cardinal rule that "[t]he courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). As we explained in our opening brief (at 25-33), both the text and policies of the FAA easily accommodate the mandate of COGSA; in this setting, COGSA controls.

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[9] Instead of addressing these basic policy concerns, respondents invent an entirely new and different "policy" for COGSA—"harmonizing trade among the nations of the world" (Resp. Br. 26). Needless to say, having devised this policy for COGSA, respondents conclude that COGSA and the FAA serve the same purposes. But Congress could not have enacted COGSA in general, and 46 U.S.C. 1300, 1303(8) and 1312 in particular, with the actual intent (as *amici* also postulate) that COGSA *not* prohibit foreign forum-and-law clauses that would, at a stroke, render COGSA itself entirely toothless. *AVC Nederland B.V. v. Atrium Inv. Partnership*, 740 F.2d 148, 160 (2d Cir. 1984) ("[a] foreign exception to COGSA would swallow the whole").

1. As a textual matter, we explained (at 26), the "saving clause" in section 2 of the FAA expressly provides for the enforceability of arbitration clauses "save upon such grounds as exist at law or in equity for the revocation of any contract." One such "ground" for revocation is where an arbitration clause violates federal statutory law. Because a foreign arbitration clause in an ocean bill of lading violates COGSA, it is therefore revocable "at law or in equity" and subject to the saving-clause exception in section 2.

Respondents offer virtually no rebuttal. They concede, as they must, that "illegality may be sufficient grounds for the avoidance of any contract" (Resp. Br. at 26). In their view, however, there is no illegality here because "the FAA is the controlling statute" (*ibid.*). But that contention is completely circular: the FAA is *not* the "controlling statute" if (1) foreign arbitration clauses, like forum selection clauses, violate section 3(8) of COGSA, and (2) the violation of a federal statute (like COGSA) is a ground for revoking a contract at law or in equity. The court of appeals assumed the first point (Pet. App. 10a n.5), and respondents concede the second point. If, as we have argued, foreign arbitration clauses are prohibited by section 3(8) of COGSA, then they are necessarily excepted from coverage under the FAA by virtue of the saving clause in section 2 of the FAA.[10]

2. Beyond the text, the policies underlying the FAA do not conflict with, but in fact readily accommodate, the application of COGSA in this setting. As we explained in our opening

[10] Furthermore, this case does not raise the question whether "Congress has clearly expressed its intent to preclude waiver of a judicial forum for the vindication of other federal statutory rights" (Resp. Br. at 23). Not only does that question have nothing to do with the saving clause of section 2 of the FAA, as respondents wrongly assert (*id.* at 24-25), but petitioner does not contend that COGSA claims cannot be arbitrated. Petitioner has not waived COGSA rights because it has not voluntarily agreed to arbitrate in Japan. Petitioner therefore does not bear the burden "to demonstrate that Congress intended [in COGSA] to preclude arbitration, or that arbitration conflicts with the underlying purpose of [COGSA]" (*id.* at 23).

brief, the fundamental premise of this Court's arbitration cases is that "[a]rbitration under the Act is a matter of consent, not coercion * * *." *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 478 (1989).[11] In the context of maritime bills of lading, however, arbitration provisions are never "freely negotiated" (*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985)), but rather, as the court of appeals acknowledged, "have been viewed as contracts of adhesion" (Pet. App. 8a-9a n.4), and rightly so. Indeed, respondents concede the point, noting that "maritime bills of lading are frequently deemed contracts of adhesion because they appear on preprinted forms and contain numerous boilerplate provisions over which the parties rarely, if ever, negotiate" (Resp. Br. 20), such that "Congress must be presumed to have been aware of the general consensus as to the adhesionary nature of * * * bills of lading" (*id.* at 21). But precisely because bills of lading are not "freely negotiated," the "strong presumption" in favor of arbitration provisions (*Mitsubishi Motors*, 473 U.S. at 631) does not hold the same force, and must instead give way to "the congressional intention expressed in some other statute" (*id.* at 627)—here, the policies of COGSA.

Respondents fundamentally mischaracterize our argument. We manifestly do *not* contend that foreign arbitration clauses in maritime bills of lading are "invalid" (Resp. Br. 20) or "void" (*id.* at 21) simply because they are adhesionary. Rather, because they are adhesionary, such clauses do not warrant the presumption of enforceability that this Court has traditionally applied to freely-negotiated arbitration provi-

[11] We therefore agree with respondents that "this Court has reinforced the principle that the FAA embodies a 'liberal federal policy favoring arbitration agreements' "—but as respondents themselves add, that policy is rooted in " 'the preeminent concern of Congress,' " which was " 'to enforce private agreements into which parties had entered' " (Resp. Br. 12-13). Absent an "agreement," the "liberal federal policy" has much less force.

sions in other settings. Thus, where, as here, foreign arbitration clauses are invoked in a case to which COGSA applies (and are the very *means* by which COGSA rights are deliberately taken away), they do not come clothed with the usual presumption of validity; in this setting, they must give way to competing federal policies.[12]

C. COGSA Prevails Even If In Conflict With The FAA

We therefore believe that COGSA and the FAA are reconcilable and that the court of appeals had no basis for applying interpretive principles to resolve a statutory "conflict." But if the statutes are in conflict, the court of appeals resolved it incorrectly.

1. First and foremost, COGSA, not the FAA, is "the more specific statute." As respondents themselves recognize, "COGSA applies to a more narrow group of contracts" (Resp. Br. 16)—specifically, ocean bills of lading. Moreover, COGSA targets only that subset of bills of lading covering the carriage of goods to and from the United States—the very

[12] *Amici's* reliance on *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (Amici Br. at 8-11), is misplaced. First, there is literally a world of difference between a forum selection clause requiring suit in Florida and one requiring arbitration in a remote overseas forum such as Japan (a distinction even respondents acknowledge (Resp. Br. 39 n.29)). Second, in *Carnival Cruise Lines*, the Court was not confronted, as here, with competing policies in two federal statutes; the Court was also not presented with a specific statute, such as COGSA, that expressly regulated the terms of the parties' contract; and the forum selection clause in question did not deprive the plaintiff (as the Japanese arbitration-and-law clause does here) of the benefits of controlling United States law. 46 U.S.C. 1300 and 1312. Third, in that case, the plaintiff concededly had prior notice of the forum clause, unlike petitioner (and other bill-of-lading consignees), to whom bills of lading are invariably presented after the ship has sailed with the cargo on board. Here, moreover, due to the manifest lack of bargaining, federal arbitration policy carries far less weight (and does not override the policies of COGSA). Fourth, clauses providing for arbitration in remote unrelated foreign venues surely "discourag[e] [American cargo owners] from pursuing legitimate claims" (499 U.S. at 595).

category at issue in this case. By contrast, the FAA targets *any* arbitration "provision" in "any maritime transaction or * * * contract evidencing a transaction involving commerce." 9 U.S.C. 2.[13]

"In a variety of contexts the Court has held that a precisely drawn, detailed statute pre-empts more general remedies." *Brown v. General Services Administration*, 425 U.S. 820, 834 (1976). As a result, "a precisely drawn statute dealing with a specific subject controls over a statute covering a more generalized spectrum." *United States v. Louwsma*, 970 F.2d 797, 799 (11th Cir. 1992), *cert. denied*, 113 S.Ct. 1383 (1993). COGSA is indisputably the more "precisely drawn statute" dealing with the "specific subject," the rights and obligations of shippers and carriers under ocean bills of lading. *Ibid.* It follows that COGSA is not the less specific statute simply because, as the court of appeals found, it "makes no reference to arbitration" (Pet. App. 12a). COGSA is the more specific statute because it governs bill-of-lading rights and obligations exclusively and comprehensively.[14]

2. Because COGSA is the more specific statute, it would be controlling (if there is, indeed, a conflict), even if the FAA were the later enacted statute (see Pet. Br. 35-36). For the reasons stated in our opening brief (*id.* at 37-38 & n.36), how-

[13] And as we pointed out in our opening brief (at 34), as stated in *Mitsubishi Motors*, 473 U.S. at 628 (emphasis added), "it is the congressional intention expressed in *some other statute* on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable." The other statute, COGSA, is necessarily the specific statute. By looking *only* to the FAA, respondents ignore that rule.

[14] Likewise, "[i]t is a basic principle of statutory construction that when two statutes are in conflict, a specific statute closely applicable to the substance of the controversy at hand controls over a more generalized provision." *Farmer v. Employment Sec. Comm'n of North Carolina*, 4 F.3d 1274, 1284 (4th Cir. 1993). The statute "closely applicable to the substance of the controversy at hand," *i.e.*, petitioner and respondents' bill-of-lading rights and obligations, is COGSA.

ever, it is highly doubtful that the FAA is, in fact, the later enacted statute: the 1947 enactment of the FAA simply made the United States Code the authoritative source of the statute, rather than the Statutes at Large.

Indeed, respondents do not take issue with that proposition.[15] They assert, however, that even if the 1947 reenactment "does not stand on the same footing as an initial enactment or a re-enactment which incorporates substantive changes in the statute" (Resp. Br. 17), nevertheless the enactment in 1970 of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention") as chapter 2 of the FAA, 9 U.S.C. 201-208, *does* constitute a later enactment, sufficient to trump COGSA (*id.* at 17-19). We disagree.

In the first place, as we have pointed out (Pet. Br. 38 n.37), respondents moved in the district court to stay petitioner's action only under chapter 1 of the FAA, 9 U.S.C. 1-15 (J.A. 21, 28, 36-37), and the district court entered its stay order pursuant only to 9 U.S.C. 3 (Pet. App. 25a). The lower courts, therefore, did not consider the Convention, and respondents, whose motion to stay was not "brought under this chapter," 9 U.S.C. 208, should not be heard to rely on it now.

Chapter 2 of the FAA would not avail respondents in any event. First, since petitioner did not agree in writing to the Tokyo arbitration clause, the Convention would arguably not even apply had it been invoked.[16] Second, like section 2 of the

[15] Respondents claim that the Second Circuit in *Indussa* "concluded that the FAA, as the later-enacted statute, governs" (Resp. Br. 16). In fact, the Second Circuit reached no such "conclusion," since the question was simply not presented. Indeed, as respondents note elsewhere (*id.* at 17), the Second Circuit expressly stated that its "ruling does not touch the question of arbitration clauses in bills of lading which require them to be held abroad." 377 F.2d at 204 n.4.

[16] The Convention, [1970] 3 U.S.T. 2517, T.I.A.S. No. 6997 (reprinted at 9 U.S.C. 201 App.), applies only to arbitration agreements "in writing," defined in article II(2) as including "an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." Here, the bill of lading was not signed or otherwise agreed to by petitioner. See *Sen Mar, Inc. v. Tiger Petroleum Corp.*, 774 F. Supp. 879, 882-83 (S.D.N.Y. 1991) (Convention held not to apply to arbitration clause in one party's telex).

FAA, the Convention has its own "saving" clause and is therefore readily reconcilable with section 3(8) of COGSA. Article II(3) of the Convention directs courts to refer parties to arbitration "unless it finds that the [arbitration] agreement is *null and void*, inoperative or incapable of being performed" (emphasis added). An arbitration agreement rendered "null and void and of no effect" by virtue of section 3(8) of COGSA is perforce "null and void" under article II(3). *See Scherk v. Alberto-Culver Company*, 417 U.S. 506, 530 n.10 (1974) (Douglas, J. dissenting) (under the Convention a court may decline to enforce an agreement which offends its law or public policy). Chapter 2 of the FAA, 9 U.S.C. 201-208, therefore poses no irreconcilable conflict with COGSA.[17]

[17] This would be true even if, as respondents contend (Resp. Br. 18 n.11), the "null and void" provision of Article II(3) of the Convention were to apply only to defenses "that can be applied neutrally on an international scale." *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 186-87 (1st Cir. 1982). The international maritime community has already spoken out strongly *against* carrier-imposed arbitration clauses in forums unrelated to the voyage in question. Thus, the *United Nations Convention on the Carriage of Goods by Sea, 31 March 1978* ("the Hamburg Rules"), U. N. Document A/CONF. 89/13, adopted without dissent by a diplomatic conference of seventy-six States and many international organizations (but not enacted in the United States), provides that carrier-imposed forum selection clauses in venues unconnected to the voyage in question (whether providing for litigation or arbitration) are unreasonable.

Articles 21 and 22 of the Hamburg Rules (reprinted in 6 *Benedict on Admiralty*, Doc. 1-3 (7th ed. 1994), give the *claimant* the option where to assert its cargo-damage claim and expressly render "null and void" any bill-of-lading forum selection clause that would force a cargo claimant to assert its claim in a remote foreign forum unconnected with the contract of carriage or its performance. See J. Honnald, *Ocean Carriers and Cargo; Clarity and Fairness—Hague Rules or Hamburg?*, 24 J. Mar. L. & Com. 75, 89 (1993) ("Consequently, the carriers' bill of lading may not prevent the shipper from pressing a claim at a place that is connected with performance of the carriage, such as the port of loading or discharge.) The fundamental unfairness of the ocean carriers' foreign home-forum arbitration clause is therefore universally recognized.

CONCLUSION

For the foregoing reasons, and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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MOTION FILED
JAN 12 1995

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

VIMAR SEGUROS Y REASEGUROS, S.A.

Petitioner,

—v.—

M/V SKY REEFER, her Engines, etc., and M.H. MARITIMA, S.A.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MOTION AND BRIEF OF THE AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS AND THE AMERICAN INSTITUTE OF MARINE UNDERWRITERS AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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QUESTIONS PRESENTED

1. Whether an owner of damaged cargo can be deprived of his rights under the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. §§ 1300-1315 (1988), and be forced to resolve his claims through arbitration in a remote jurisdiction, bearing no reasonable connection to the transaction, when:

   a) The cargo owner had no notice of the foreign arbitration clause before receipt of the damaged goods; and

   b) The cargo owner had no opportunity to negotiate the terms of the foreign arbitration clause denying those rights guaranteed by COGSA?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

VIMAR SEGUROS Y REASEGUROS, S.A.,

Petitioner,

—v.—

M/V SKY REEFER, her Engines, etc., and M.H. MARITIMA, S.A.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

STATEMENT OF INTEREST OF THE AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS AND OF THE AMERICAN INSTITUTE OF MARINE UNDERWRITERS AND MOTION FOR LEAVE TO INTERVENE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

The American Association of Exporters and Importers ("AAEI") and the American Institute of Marine Underwriters ("AIMU") hereby request permission to file a brief *amicus curiae* in the above matter. Consent of all parties has been duly requested. Petitioner has consented to the filing of this brief. Respondent has refused to consent.

AAEI is a national trade association representing over eleven hundred importers and exporters in the United States. AAEI was established in 1921 to promote fair and open trade

among nations and the protection of the international trade interests of its members. AAEI is the only national, industry-wide organization committed to representing the American international trade community. Its members include importers and exporters of a broad range of industrial and consumer goods and the organizations which serve them - freight forwarders, customs brokers, banks, law firms, countertrade specialists, export trading companies, insurance and accounting firms, shipping lines and air carriers.

The issues before the Court in this matter are of vital importance to AAEI and its members. Importers, exporters and their insurers have a significant interest in the outcome of this matter. Their ability to seek redress for damage to cargo in U.S. international trade could be seriously restricted if the lower court decision is permitted to stand. Shipowners will insert boilerplate provisions in bills of lading requiring claims adjudication in remote lands. The expense and delay caused by such unilateral requirements will substantially circumscribe cargo owners' abilities to seek redress.

The outcome of this litigation could have a significant impact on U.S. trade and the balance of payments. According to the U.S. Department of Commerce, the total value of U.S. waterborne exports in 1993 was over $176 billion. The total value of U.S. waterborne imports in 1993 was over $335 billion. U.S. importers and exporters will be significantly impacted by the outcome of this decision. Their ability to hold foreign shipowners responsible for damage to cargo in U.S. international trade as provided in the Carriage of Goods by Sea Act will be seriously restricted if the decision below stands.

AIMU was founded in 1898 and is a national trade association of over ninety insurance companies, each of which is authorized to engage in the business of marine insurance, including cargo transportation insurance, in one or more states of the United States. Because its membership underwrites

approximately ninety percent of the marine insurance written in the United States, the issues of this case are of extreme importance to AIMU and its member companies in their efforts to maintain uniformity in and consistent application of the laws affecting maritime commerce and marine insurance. An issue of very special significance to AIMU and its member companies is presented in this case. Cargo insurance plays a significant role in facilitating international trade. The premiums charged to cargo owners reflect their loss experience. Cargo insurance rates are directly influenced by the ability to seek redress from shipowners for damage to cargo.

Importers, exporters and their insurers must not be denied the rights granted to them by Congress in the Carriage of Goods by Sea Act. The narrowing of their right to assert claims pursuant to that statute will have a deleterious effect on U.S. trade.

AAEI and AIMU respectfully pray that this Honorable Court accept their brief *amicus curiae*.

Respectfully submitted,

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January 12, 1995

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

VIMAR SEGUROS Y REASEGUROS, S.A.,

Petitioner,

—v.—

M/V SKY REEFER, her Engines, etc., and M.H. MARITIMA, S.A.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS AND THE AMERICAN INSTITUTE OF MARINE UNDERWRITERS AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

SUMMARY OF ARGUMENT

The fundamental policies underlying both the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.* (1988), and the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. §§ 1300-1315 (1988), are undermined by the decision of the court below. The FAA was intended to encourage enforcement of mutually agreed arbitration contracts, not to coerce parties into arbitration in remote lands.

The court below misconstrued the policy favoring enforcement of mutually agreed arbitration agreements. The instant

form bill of lading—a contract of adhesion—must be construed against Respondents. The unilaterally imposed foreign arbitration clause cannot be used to deprive rights guaranteed to cargo interests by the Carriage of Goods by Sea Act.

All rules of statutory construction require that COGSA must continue to determine the enforceability of foreign arbitration clauses in bills of lading. The foreign arbitration clause before the Court is a *per se* violation of COGSA and may not be enforced.

ARGUMENT

I.

AN AGREEMENT TO ARBITRATE MUST BE BASED ON MUTUAL CONSENT. A CONTRACT OF ADHESION MAY NOT BE EMPLOYED BY THE COURTS TO DENY STATUTORY PROTECTIONS.

The duty to arbitrate is contractual in origin and no party can be forced into arbitration unless he has agreed to go there. *Bergquist Co. v. Sunroc Corp.*, 777 F. Supp. 1236 (E.D. Pa. 1991); *Virginia Carolina Tools, Inc. v. International Tool Supply, Inc.*, 793 F. Supp. 664 (W.D.N.C. 1992), *aff'd*, 984 F.2d 113 (4th Cir.), *cert. denied*, 113 S. Ct. 2930 (1993). Despite the strong federal policy in favor of arbitration, arbitration still remains a matter of contract. Parties cannot be forced to submit to arbitration a dispute which they have not agreed to arbitrate. *Lounge-A-Round v. GCM Mills, Inc.*, 166 Cal. Rptr. 920 (Ct. App. 1980); *Georgia Power Co. v. Cimarron Coal Corp.*, 526 F.2d 101, 106 (6th Cir. 1975), *cert. denied*, 425 U.S. 952 (1976). Nevertheless, the lower court in this matter would force Petitioner to submit to arbitration in a distant land even though Petitioner never consented to arbitration. The lower court decision undermines the foundation of federal policy favoring arbitration. Arbitration must be founded upon the consent of those to be bound by the arbitration proceedings. *United States v. Pool and Canfield, Inc.*, 778 F. Supp. 1088 (W.D. Mo. 1991).

It is fundamentally unfair to distort a policy favoring enforcement of mutually agreed arbitration contracts in order to deprive parties of statutory rights when there has been no true agreement to arbitrate. But that is precisely what the lower court would do in the instant case. Petitioner is the subrogated cargo insurer of an importer and distributor of fruit in New England. The importer contracted with a Moroccan supplier for a shipment of Moroccan oranges to the United States. The oranges were shipped on board the Respondent vessel but were crushed during the transportation, apparently due to negligent storage. At the time of the shipment, the vessel owner's local agents in Morocco issued to the shipper a form bill of lading with various boilerplate provisions. There was no negotiation as to the terms of the bill of lading which was to constitute the contract of carriage between the cargo owner and the shipowner.

One of the boilerplate provisions in the form bill of lading prepared unilaterally by Respondents was the following:

> 3. **Governing Law and Arbitration**
>
> (1) The contract evidenced by or contained in this Bill of Lading shall be governed by Japanese law.
>
> (2) Any dispute arising from this Bill of Lading shall be referred to arbitration in Tokyo by the Tokyo Maritime Arbitration Commission (TOMAC) of The Japan Shipping Exchange Inc., in accordance with the Rules of TOMAC and any amendments thereto, and the award by the arbitrators shall be final and binding on both parties.

According to this boilerplate provision, any dispute arising from the transportation of Moroccan oranges from Agadir to New Bedford, Massachusetts on a vessel owned by a Panamanian corporation was to be arbitrated in Japan according to

Japanese law. Even the drafters of this one-sided boilerplate form realized that it would violate protections afforded to American importers under the Carriage of Goods by Sea Act. *See infra* pp. 7-8. Accordingly, a back-up provision was inserted providing that COGSA would apply if the shipowner did not succeed with his attempt to unilaterally displace the American cargo owner's COGSA rights with Japanese arbitration and law.

The court below took the unprecedented position that the Federal Arbitration Act alone applies to the question of the validity of the Japanese arbitration clause. The lower court erroneously relied upon the federal policy favoring enforcement of mutually agreed arbitration agreements to coerce cargo owners to comply with a contract of adhesion forcing arbitration in an unreasonably remote forum. Applying a flawed statutory construction analysis, the lower court cast aside the statutory protections guaranteed by COGSA to the American importer. *See infra* pp. 14-19. Instead, the FAA was held to have ousted the COGSA protections and to require enforcement of the unilaterally imposed foreign arbitration clause.

A court, when sitting in admiralty, is an equity court and must apply equitable principles to insure that justice is done between the parties. *Midland Tar Distillers, Inc. v. M/T LOTOS*, 362 F. Supp. 1311, 1315 n.5 (S.D.N.Y. 1973). Hardship or injustice should not be created by courts attempting to effectuate arbitration "agreements" which do not reflect the intent of the parties. *Id.* But that is precisely what the lower court has done. If that decision is permitted to stand, cargo interests will be forced to pursue claims against carriers in costly, remote jurisdictions because their COGSA protections have been denied, even though there has been no agreement to such arbitration.

The Circuit Courts of Appeal have uniformly held that bills of lading are contracts of adhesion which must be strictly enforced against the carrier. *Gamma-10 Plastics, Inc.*

v. American President Lines, 32 F.3d 1244 (8th Cir. 1994); *All Pacific Trading, Inc. v. Vessel M/V HANJIN YOSU*, 7 F.3d 1427 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1301 (1994); *Mitsui & Co. v. American Export Lines*, 636 F.2d 807 (2d Cir. 1981). *See also Allied Chemical Int'l Corp. v. Companhia de Navegacao Lloyd Brasileiro*, 775 F.2d 476 (2d Cir. 1985), *cert. denied*, 475 U.S. 1099 (1986); *Interocean S.S. Corp. v. New Orleans Cold Storage and Warehouse Co.*, 865 F.2d 699 (5th Cir. 1989); *EF Operating Corp. v. American Bldgs.*, 993 F.2d 1046 (3d Cir.), *cert. denied*, 114 S. Ct. 193 (1993); *Encyclopaedia Britannica, Inc. v. SS HONG KONG PRODUCER*, 422 F.2d 7 (2d Cir. 1969), *cert. denied*, 397 U.S. 964 (1970); *Cabot Corp. v. S.S. MORMACSCAN*, 441 F.2d 476 (2d Cir.), *cert. denied*, 404 U.S. 855 (1971).

In its analysis, the court below improperly refused to consider the fact that the instant arbitration clause was a contract of adhesion.[1] But the question of whether the arbitration clause was mutually agreed is fundamental to a determination regarding enforcement of the arbitration agreement. Enforcement of a mutually agreed contract to arbitrate and coercive enforcement of a clause inserted unilaterally by the carrier into a contract of adhesion cannot stand on the same footing before the law.

Courts have distinguished effectively between incorporation of an arbitration clause in a bill of lading pursuant to an express agreement and incorporation of such a clause pursuant to a "form contract of adhesion." *Kaystone Chemical, Inc. v. BOW-SUN*, 1989 A.M.C. 2976, 2981-82 (S.D.N.Y. 1989). A primary consideration is whether or not the bill of lading provides adequate notice to the consignee. There also must be an express agreement providing for such foreign arbitration. In *Kaystone*, there was a specifically negotiated arbitration agreement between the parties in the charter party which was then incorporated into the bill of lading and the

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[1] The basis for this refusal is unclear. The district court opinion did address the question.

agreement was enforced. In this case, however, there was no such negotiated agreement. In fact, there was no "agreement" at all. The arbitration clause was inserted unilaterally by the shipowner and the cargo owner did not even have notice of the clause. The lower court declined to consider such analysis. The First Circuit erred when it refused to address the basic issue of mutuality of contract and notice, despite the fact that the contract of adhesion agreements were considered by the district court.

Other circuits have acknowledged this fundamental precept: contracts of adhesion should be strictly construed against the drafter. *See supra* pp. 4-5. Even where there has actually been an agreement to arbitrate, courts have protected the weaker party to the agreement from waiving certain rights guaranteed by statute. Most recently, the Ninth Circuit considered an arbitration clause in a distributorship agreement. That Court of Appeals ruled that even though a franchisee may agree to arbitration as a forum for the resolution of disputes, franchisees could not be forced to surrender rights granted to them by Congress. "Disparity of bargaining power" was a significant consideration in striking down the arbitration agreement.

> In effect, the franchisors could simply continue their earlier practice of presenting prospective franchisees with contracts of adhesion that deny them the rights and benefits afforded by Congress. In that way, the PMPA would quickly be nullified.

Graham Oil Co. v. Arco Products Co., Nos. 92-35007, 92-35380, 1994 WL 701315, at *3 (9th Cir. 1994).

In reaching its conclusion that the arbitration "agreement" should not be enforced, the Ninth Circuit also relied heavily upon the rule that contracts of adhesion must be strictly construed against the drafter. *Id.* at *4. The court looked to the presumed intent of the party that lacked the bargaining power and adopted the construction most favorable to it. *Id.* Accordingly, the distributorship franchisee's Congressionally mandated rights could not be deprived even where there was an agreement.

In the instant case, there was no agreement between the parties whatsoever regarding arbitration in a distant land. The foreign arbitration clause was inserted unilaterally into a contract of adhesion—a form bill of lading—by the carrier who had sole control over its contents. Nevertheless, the lower court in this case would permit such a unilaterally imposed clause to deprive the cargo owner of his Congressionally mandated rights under COGSA. If the lower court had adopted the analysis of the Ninth Circuit, the cargo owner, who had no notice and no opportunity to negotiate the foreign arbitration clause, would not be deprived of COGSA protections. The analysis of the Ninth Circuit with respect to enforcement of such contracts of adhesion is the proper one.

II.

COERCION OF A PARTY WHO HAS NOT AGREED TO REMOTE FOREIGN ARBITRATION VIOLATES THE PURPOSES OF BOTH THE FEDERAL ARBITRATION ACT AND THE CARRIAGE OF GOODS BY SEA ACT.

The Carriage of Goods by Sea Act was aimed at protecting cargo owners from unilaterally imposed clauses in bills of lading. Congress specifically "intended COGSA to ameliorate this very difficulty of bills of lading with one-sided form provisions." *Union Ins. Soc'y of Canton, Ltd. v. S.S. ELIKON*, 642 F.2d 721, 724 (4th Cir. 1981). In view of this policy, non-negotiated foreign arbitration clauses have been held to be contracts of adhesion which are properly governed by COGSA. *Pacific Lumber & Shipping Co. v. Star Shipping A/S*, 464 F. Supp. 1314, 1315 (W.D. Wash. 1979). The loss of statutorily protected rights under COGSA has been guarded against.

> If ocean carriers were allowed to unilaterally select the forum for the resolution of cargo claims it would be an invitation to carriers to select forums having no relationship to the ports of loading or discharge, and the carriers would be at liberty to select forums that might not fairly enforce COGSA.

Id.

The decision below flies in the face of the principles underlying COGSA. The court below admits that reduction of uncertainty with respect to the rights of shippers was one of the purposes for enactment of COGSA in 1936. The lower court stated:

> COGSA was also intended to reduce uncertainty concerning the responsibilities and liabilities of carriers, responsibilities and rights of shippers, and liabilities of insurers.

Vimar Seguros Y Reaseguros, S.A. v. M/V SKY REEFER, 29 F.3d 727, 728 (1st Cir.), *cert. granted*, 115 S. Ct. 571 (1994). The lower court also agrees that COGSA applies to the instant form bill of lading as a matter of law. But, through a strained statutory construction analysis, the court below ignored the basic policies underlying COGSA. If upheld, the decision of the lower court will work directly against these stated objectives. Cargo owners will be deprived of rights granted by COGSA in 1936. Importers and exporters of goods into or from the United States will not know how or where their claims against carriers for damage to cargo in international transport should be made. Uncertainty and expense will increase substantially.

As the Second Circuit has aptly pointed out, requiring cargo interests to seek redress for damage to cargo in a distant land puts a "high hurdle" in the way of enforcing cargo interest rights. *Indussa Corp. v. S.S. RANBORG*, 377 F.2d 200 (2d Cir. 1967) (*en banc*). The Second Circuit and the Eleventh

Circuit and other courts have recognized the importance of protection of COGSA rights in the face of clauses unilaterally inserted in form bills of lading. The practical application of the lower court's opinion here will be to force lower settlements. Cargo interests will no longer continue to have the right to adjudicate their claims in a convenient forum, as guaranteed by COGSA.

Other courts have generally upheld the viability of statutorily protected rights under COGSA. The Eleventh Circuit has ruled that a foreign arbitration clause conflicts with COGSA's "implied policy that an American forum will be made available to a consignee . . . ." *State Establishment for Agric. Prod. Trading v. M/V WESERMUNDE*, 838 F.2d 1576, 1581 (11th Cir.), *cert. denied*, 488 U.S. 916 (1988). But the First Circuit would deny such protections based on a contract of adhesion inserted unilaterally by the carrier.

The Eleventh Circuit analysis is instructive. In striking down the foreign arbitration clause, lack of notice was an important consideration to the Eleventh Circuit. At a minimum, the consignee must have actual notice of the foreign arbitration clause conflicting with COGSA rights before there can be an enforceable contract. *Id.* Actual notice of provisions that would deny him his federal statutory protections under COGSA must be given to the consignee "in order to insure a reasonable result and to prevent injustice." *Id. Compare* with the instant case, in which the consignee had no knowledge of the insertion of the arbitration clause in the form bill of lading until the oranges were delivered in a damaged condition. Requiring arbitration in Japan according to Japanese law in this case would be both unreasonable and unjust.

Another critical consideration by the Eleventh Circuit was the absence of any real negotiation between the parties regarding the arbitration provision.

> There is no evidence that the terms of the bills of lading in this case were agreed to through hard bargaining;

> rather they appear to be the form clauses of an adhesion contract.

Id. at 1582. That court struck down the form arbitration clause inserted unilaterally by the carrier because without bargaining, there was no mutual agreement. In the instant case, there was no notice, no bargaining and no agreement regarding the clause. The enforcement of the clause is improper.

The Eleventh Circuit also held that COGSA protections cannot be relinquished by implication. In order that COGSA not apply, there must be an express agreement that COGSA was not intended to apply. *Id.* at 1580. A unilaterally imposed foreign arbitration clause violates COGSA guarantees. COGSA bars the foreign arbitration clause *per se* because "contractual language requiring a consignee to litigate claims against the carrier in a foreign forum under foreign law . . . [is] ineffective because such provisions, as a practical matter, tend to lessen the liability of the carrier, particularly where the claim is small." *Id.* at 1580-81. The real effect of insertion of a clause requiring arbitration in a remote, expensive forum is to dissuade owners of damaged goods from filing claims or to force small settlements.

The analyses of the Second and Eleventh Circuits conform to considerations outlined by this Court. This Court has reviewed forum selection clauses, after considering the bargained nature of the contract, the reasonableness of the forum and the general policy of encouraging private contractual choice for dispute resolution. *Union Ins. Soc'y*, 642 F.2d at 724 (citing *The BREMEN v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972)). This Court has taken particular note when COGSA does not apply. *The BREMEN v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 n.11 (1972). Where COGSA does apply, its statutory provisions must be given effect.

The important considerations of notice and bargaining power have led courts to strike down foreign arbitration clauses inserted into contract of adhesion bills of lading. The

practical aspects of the transactions are important. The typical ocean bill of lading transaction has been described by the courts:

> And it is very unlikely that plaintiffs, as consignees, would have had actual notice of, or have engaged in any "hard bargaining" with respect to, the foreign arbitration clause, prior to entering into the transaction with the shipper.
>
> In the typical transaction an ocean bill of lading for common carriage is a contract of adhesion. Most often, the ocean bill of lading is prepared abroad by the carrier and delivered to the shipper in exchange for the goods. The shipper then exchanges the bill of lading with a bank which had previously arranged letter of credit financing at the consignee's behest. Thus, the consignee most often does not have any access to the bill of lading before entering into its transaction with the shipper. In the typical transaction the ocean bill of lading for common carriage is a form bill, incorporating terms of COGSA, which is prepared by the carrier. The consignee does not negotiate with the shipper with respect to jurisdictional terms to be included in, or omitted from, the bill of lading. The virtue of this typical practice is that it keeps things simple and therefore ensures the efficient effectuation of international commercial transactions. Such practice is consistent with the underlying policy of COGSA . . . .

Organes Enterprises, Inc. v. M/V KHALIJ FROST, 1989 A.M.C. 1460, 1465-66 (S.D.N.Y. 1989). The economic strength and bargaining power of the parties to ocean bills of lading are not even "roughly equal." *Id.* at 1464 (citing *Siderius, Inc. v. M.V. IDA PRIMA*, 613 F. Supp. 916, 920-21 (S.D.N.Y. 1985)). That fact should be a strong factor in favor of enforcing the consignee's rights under COGSA and against coercing arbitration in a distant land.

The scope of arbitration clauses in common carrier bills of lading cannot be left solely to contractual arrangement. *Aaacon Auto Transport, Inc. v. State Farm Mut. Auto. Ins. Co.*, 537 F.2d 648, 655 (2d Cir. 1976), *cert. denied*, 429 U.S. 1042 (1977). Such bills of lading are contracts of adhesion and statutory protections of cargo owners must be closely guarded. *Id.* In order to effectuate the underlying policy of COGSA to reduce uncertainty concerning the rights and liabilities of carriers, shippers and underwriters, a foreign arbitration clause in an ocean bill of lading is a *per se* violation of § 1303(8) of COGSA. This Court should rule that the instant clause from the carrier's form bill of lading is null and void and without effect. *See Organes Enterprises*, 1989 A.M.C. at 1466.

Enforcement of the Japanese arbitration clause inserted unilaterally into its form bill of lading by the carrier would also violate the policies underlying the FAA. Congress enacted the FAA to relieve parties of the expense and delays of litigation. *Securities Indus. Ass'n v. Connolly*, 883 F.2d 1114, 1119 (1st Cir. 1989), *cert. denied*, 495 U.S. 956 (1990). But the decision of the lower court will do just the opposite. If the instant clause is enforced against the cargo owner, expense and delay are certain to result. Requiring arbitration in Japan, a forum which bears no reasonable connection to the transaction, will place an extreme hardship on Petitioner. The cost of conducting arbitration in such a distant land, especially in light of the strong yen, will be prohibitive. Arbitration in Japan saves neither time nor money. *See* Steven Passer, Comment, *Commercial Arbitration Between American and Japanese Business: A Japanese Perspective*, 39 Kan. L. Rev. 223, 228 nn.30-31 (1990).

Another preeminent concern in passing the FAA was to encourage enforcement of private arbitration agreements into which parties had entered. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985). The first task of a court in analyzing arbitration clauses is to determine

whether, in fact, the parties agreed to arbitrate. *Id.* at 626. This Court has recognized "that the FAA does not require parties to arbitrate when they have not agreed to do so." *Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 478 (1989) (citing *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985)). The FAA is intended to require courts to enforce "privately negotiated agreements" to arbitrate in accordance with their terms just like any other agreement. Arbitration under the FAA is and must continue to be a matter of consent, not coersion. *Id.* at 477-78. Enforcement of the instant clause would violate this FAA underpinning.

The unreasonableness of the foreign forum is also an important consideration. When a clause in a bill of lading requires adjudication in a foreign jurisdiction, that clause will not be enforced, especially where the terms of the bill of lading are not agreed to through hard bargaining, but rather are inserted as part of form clauses of an adhesion contract. *Union Ins. Soc'y*, 642 F.2d at 724. This is particularly so when the foreign forum is unreasonable. *Id.* at 725.

The purpose of the Federal Arbitration Act was to enforce lawful agreements entered into by parties. It clearly was not to impose arbitration on parties involuntarily. *Casarotto v. Lombardi*, No. 93-488, 1994 WL 702758, at *7 (Sup. Ct. Mont. 1994) (citing *Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 477-78 (1989)). The First Circuit has been criticized for its flawed analysis supporting the validity of arbitration agreements. *Id.* at *11. The lower court has been accused even of arrogance and intellectual detachment from reality. *Id.* These harsh words stem from the First Circuit's failure to consider the hardships imposed on the party that is forced to arbitrate disputes far from home.

> Nowhere in his opinion does he consider the financial hardship that contracts, like the one in this case, impose on people who simply cannot afford to enforce their rights by the process that has been forced upon them.

Id.

The notion that a consignee without notice could have knowingly and voluntarily bargained and agreed to resolve its contractual disputes by arbitration is "naive at best, and self-serving and cynical at worst." *Id.* A contract or agreement suggests mutuality, but there can be no mutuality in a contract of adhesion—such as a form bill of lading—which the consignee has absolutely no role in negotiating. The line of cases, particularly in the First Circuit, which has imposed arbitration agreements in contracts of adhesion on unsuspecting parties has been properly criticized.

> These decisions have perverted the purpose of the FAA from one to accomplish judicial neutrality, to one of open hostility to any legislative effort to assure that unsophisticated parties to contracts of adhesion at least understand the rights they are giving up.

Id. at *12. In order to effectuate the purposes of both the FAA and COGSA, the decision below should be reversed.

III.

THE REPEAL OF COGSA PROTECTIONS FOR CARGO OWNERS FROM ABUSIVE FORM BILLS OF LADING CAN NOT BE IMPLIED FROM THE MERE RECODIFICATION OF THE FEDERAL ARBITRATION ACT.

The decision below rests upon the conviction that the Federal Arbitration Act is the only statute which governs the validity of foreign arbitration clauses. *Vimar Seguros Y Reaseguros, S.A. v. M/V SKY REEFER*, 29 F.3d 727, 731 (1st Cir. 1994). According to the court below, COGSA has no application to the validity of the arbitration clause despite the fact that COGSA applies **as a matter of law** to the bill of lading itself. *Id.* at 729. The lower court erred when it engaged in its contorted statutory construction analysis in order to reach the conclusion that the FAA alone applies to the instant

arbitration clause. The process by which the lower court ousted COGSA from application to the foreign arbitration clause—despite agreement that COGSA applies to the form bill of lading itself—is flawed and circuitous. The ouster of COGSA violated venerable canons of statutory construction.

A. THE COURT BELOW DISREGARDED AN IMPORTANT STATUTORY CONSTRUCTION CANON: WHEN TWO STATUTES MAY CONFLICT, A COURT MUST STRIVE TO GIVE EFFECT TO BOTH.

Courts, when confronted by arguably different conflicting statutes, must give effect to both where possible. *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992). In fact, courts are under a duty to construe statutes harmoniously where that can be done reasonably. 2B Norman J. Singer, *Sutherland Statutory Construction* § 53.01 at 229-30 (5th ed. 1992). But the court below made no effort to harmonize the FAA and COGSA. Instead, the recodification of the FAA was held to have removed impliedly COGSA from application over foreign arbitration clauses in bills of lading.

Recognizing this primary canon of statutory construction in another case, however, the First Circuit acknowledged that an appellate court's primary obligation is to determine if, in fact, there is a conflict between the statutes before it.

> The preferred approach to statutory construction dictates that a reviewing court first determine if the **perceived conflict** between two laws is **real**.

Sunshine Development, Inc. v. FDIC, 33 F.3d 106, 113 (1st Cir. 1994) (emphasis added). In that case, the court correctly concluded that where statutes can be reconciled, the perceived conflict is only apparent and not real. In the instant case, however, the lower court failed to give proper consideration to this important rule of statutory construction. No attempt was made to reconcile the two statutes.

The lower court also relied upon the strong federal policy favoring arbitration as a basis for ousting COGSA application to a foreign arbitration clause in a form bill of lading. It disregarded this Court's recognition that the FAA does not require parties to arbitrate when they have not agreed to do so. *Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 478 (1989). The FAA "does not mandate the arbitration of all claims." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219 (1985).

The court below erred when it held that only the FAA must be given effect on the basis the FAA limits the allegedly prior-enacted COGSA. The court was wrong. In fact, COGSA was enacted in 1936. The FAA was enacted in 1924, not 1947, as erroneously reported in the decision below. 29 F.3d at 732.

The lower court took the position that the FAA recodification in 1947 impliedly repealed the protections granted to cargo owners under COGSA. But an intent to repeal can only be implied from an irreconcilable conflict between enactments. *United States v. King*, 824 F.2d 313 (4th Cir. 1987).

B. A REPEAL OF COGSA, ENACTED IN 1936, CANNOT BE IMPLIED FROM ENACTMENT OF THE FAA IN 1925 OR ITS RECODIFICATION IN 1947.

Courts are reluctant to find repeal by implication. Even where two statutes conflict somewhat, a court is under a duty to give effect to both, unless the text of the latter statute or its legislative history shows that Congress specifically intended to repeal the earlier statutory provision and simply failed to do so expressly. *United States v. Barrett*, 837 F.2d 933 (10th Cir. 1988). Here, the legislative history of the recodification of the FAA in 1947 shows the opposite intent. **No material change** was intended. H.R. Rep. No. 255, 80th Cong., 1st Sess. at 1515 (1947). It is impossible that the FAA recodification ousted provisions in COGSA.

The FAA was enacted in 1925 as Public Law 68-401, eleven years before enactment of COGSA. In 1947, however, as part of a series of enactments to adopt the various titles of the United States Code into "positive law," Title 9 of the United States Code was itself enacted. Prior to that time, it was only the Statutes at Large which had actually been enacted. Confirming that the recodification could not be interpreted to change the law, the House Committee on the Judiciary stated the following:

> This bill takes each section of title 9 of the United States Code, 1940 edition as of January 2, 1947, and **without any material change** enacts each section into positive law. No attempt is made in this bill to make amendments in existing law. That is left to amendatory acts to be introduced after the approval of this bill.

H.R. Rep. No. 255 at 1515 (emphasis added). Title 9 of the Code had not been enacted into positive law prior to 1947. That meant that one had to consult the appropriate volume of the United States Statutes at Large to be certain of the content of the Code. *See Richey v. Indiana Dept. of State Revenue*, 634 N.E.2d 1375 (T.C. Ind. 1994); 1 U.S.C. § 204(a) (1988). Enactment into positive law means only "law actually and specifically enacted or adopted." *Black's Law Dictionary* 1162 (6th ed. 1990). Prior to 1947, the FAA, as recorded in the Statutes at Large, was the only positive law provision. The 1947 recodification was part of a series of bills intended to enact all titles of the United States Code as positive law. *See* H.R. Rep. No. 251, 80th Cong., 1st Sess. (1947). The lower court has erroneously attempted to bootstrap this recodification into a repeal of COGSA provisions. It cannot be done. No amendments to existing law were intended by the recodification. This Court has stated:

> [I]t will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.

Fourco Glass Co. v. Transmirra Prods. Corp., 353 U.S. 222, 227 (1957); *see also United States v. Le Bris*, 121 U.S. 278, 280 (1887) and *Anderson v. Pacific Coast S.S. Co.*, 225 U.S. 187, 199 (1912). This is particularly so when as here no significant change in wording is made. *Logan v. United States*, 144 U.S. 263, 302 (1892). But the court below has made just such a forbidden inference. According to the decision on review here, the 1947 recodification of the FAA in Title 9 of the U.S. Code should be inferred to oust COGSA from application to a foreign arbitration clause found in a form bill of lading. But the express intent of the drafters was the opposite. No such fundamental change would be made by the revisers without express intent. *United States v. Ryder*, 110 U.S. 729, 739-40 (1884).

The lower court has turned statutory construction on its head. The legislative history of the 1947 recodification makes it clear that there was no material change intended. There was no mention of COGSA in the recodification and no reference to a repeal of protections afforded to a cargo owner under COGSA. The lower court improperly inferred such a result.

The 1925 legislative history of the FAA is itself instructive as to the enforceability of arbitration clauses in form bills of lading. Prior to the enactment of the FAA, the Joint Congressional Committee of the Judiciary held hearings on the arbitration of interstate commercial disputes. One of the specific concerns of the Joint Committee was the specter of shippers being presented with boilerplate arbitration clauses without having the power to refuse arbitration. At the hearing, the Chairman of the Joint Committee specifically inquired about form bills of lading and arbitration clauses inserted on a "take it" or "leave it" basis. The Committee was assured that the "bill of lading act" would control. That act contained the terms of the bill of lading and "that is a protection to the shipper." *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcommittees of the Committee on the Judiciary*, 68th Cong., 1st Sess. 15

(1924). Clearly, the intent of Congress was not to supersede the bill of lading statute, the precursor to COGSA (Pomerene Bills of Lading Act, 49 U.S.C. app. §§ 81-124 (1988)) in effect in 1925.

When Congress enacted COGSA in 1936, it specifically sought to protect the rights of shippers, consignees and their insurers from the overreaching powers of carriers. Shipowners were not permitted to lessen their liability by inserting disclaimers in the bill of lading. Had the lower court properly analyzed the interplay of the two statutes, it would have determined that COGSA applies *per se* to the foreign arbitration clause. COGSA, as a later enacted, more specific statute, controls the enforceability of such clauses.

The lower court's own analysis belies its own error. COGSA was enacted eleven years after the FAA. According to the lower court:

> First, a later enacted statute generally limits the scope of an earlier statute if the two laws conflict.

29 F.3d at 732. If there is any conflict between COGSA and the FAA, COGSA controls. At a minimum, the two statutes must be construed so as to give effect to both. The lower court also stated:

> Second, where two statutes conflict, regardless of the priority of enactment, the specific statute ordinarily controls the general.

Id. It is a commonplace rule "of statutory construction that the specific governs the general." *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2037 (1992). Furthermore, Congress is presumed to legislate with knowledge of the basic rules of statutory construction. *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496 (1991). Certainly, COGSA is the more specific statute applying solely to the maritime transactions within its scope. The lower court simply misconstrued the rules of statutory construction in analyzing the effect of the two statutes.

The subsequent legislative history of the FAA also supports the proposition that a contract of adhesion form bill of lading cannot be used to coerce foreign arbitration. When the FAA was amended in 1970 to adopt the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, it was made even more clear that mutuality of contract in arbitration agreements is required. Under the Convention, an "agreement in writing" to arbitrate must be signed by the parties or otherwise contained in an exchange of letters or telegrams. 9 U.S.C.A. § 201 note (West Supp. 1994) (Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. II(2)). The FAA enacted in 1925 made reference solely to an agreement in writing to arbitrate. 9 U.S.C. § 2 (1988). The subsequent international Convention adhered to by the United States recognized the dangers of contracts of adhesion requiring arbitration without notice to a party. Now, a signature is required to constitute an agreement to arbitrate under the Convention making it all the more difficult to impose such clauses unilaterally.

This Court has frowned upon distortions of contract interpretation and statutory construction in determining the arbitrability of an issue.

> Just as it is the congressional policy manifested in the Federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by that Act, it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable.

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627 (1985). In the case of foreign arbitration clauses in ocean bills of lading, it is COGSA which must control. The decision of the lower court flies in the face of the intent of Congress in enacting the FAA and COGSA and violates the principles of statutory construction established by this Court.

CONCLUSION

It is respectfully submitted that the decision of the lower court is incorrect and should be reversed. The foreign arbitration clause is unenforceable and Petitioner's claims should be heard below.

Respectfully submitted,

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January 12, 1995

(4)

No. 94-623

Supreme Court
FILED
FEB 21 1995
OFFICE OF THE CLERK

In The

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October Term, 1994

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American Steamship Owners Mutual Protection and Indemnity Association, Inc., Assuranceforeningen Gard (Gjensidig), Assuranceforeningen Skuld (Gjensidig), The Britannia Steam Ship Insurance Association Limited, Liverpool and London Steamship Protection and Indemnity Association Limited, The London Steam Ship Owners Mutual Insurance Association Limited, The Newcastle Protection and Indemnity Association, The North of England Protecting and Indemnity Association Limited, The Shipowners' Mutual Protection and Indemnity Association (Luxembourg), The Standard Steamship Owners Protection and Indemnity Association (Bermuda) Limited, The Steamship Mutual Underwriting Association (Bermuda) Limited, Sveriges Angfartygs Assurans Forening, The United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited, and The West of England Shipowners Mutual Insurance Association (Luxembourg) respectfully submit this brief as *amici curiae* in support of the respondents.

Petitioner and respondents have given their consent to the filing of this brief, and copies of their attorneys' letters granting consent are being filed with the Clerk of the Court in conjunction with this brief.

INTEREST OF AMICI CURIAE

Amici compromise fourteen mutual insurance associations known as "protection and indemnity clubs" (often abbreviated as "P&I clubs"). P&I clubs are "associations of shipowners banded together to spread and

absorb liabilities falling on their members." GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 76 (2d ed. 1975); *see also* LESLIE J. BUGLASS, MARINE INSURANCE AND GENERAL AVERAGE IN THE UNITED STATES 386-418 (3d ed. 1991); William R.A. Birch Reynardson, *The History and Development of P&I Insurance: The British Scene*, 43 TUL. L. REV. 457 (1969); John P. Kipp, *The History and Development of P&I Insurance: The American Scene*, 43 TUL. L. REV. 475 (1969). The members of *amici* are owners and operators of ships of practically all maritime nations. In the aggregate, *amici* insure tens of thousands of vessels totaling almost 400 million gross registered tons, or more than 85% of the world's ocean-going tonnage. *Amici* protect their members in respect of most of the liability risks that arise from the operation of vessels in international maritime commerce.

One significant liability risk for which *amici* insure their members is the risk that vessel owners will be held liable to cargo owners for the loss of or damage to cargo carried on their vessels. *See, e.g.*, BUGLASS, *supra*, at 410-411; John C. Moore, *Liability for Damage to Property Carried, to be Carried, or Which Has Been C rried*, 43 TUL. L. REV. 581, 582-583 (1969). Thus *amici* have a vital interest in the proper interpretation of the legal standards under which liability may be imposed, including the Carriage of Goods by Sea Act ("COSGA"), 46 U.S.C. app. §§ 1300-1315.

Amici have a particular interest in the resolution of the present case. Some members of the *amicus* associations use standard-form bills of lading that include clauses calling for arbitration in forums outside of the

United States. *Amici* accordingly have an interest in seeing that such clauses are enforceable in the U.S. courts. A far larger number of their members use standard-form bills of lading with clauses calling for *litigation* in forums outside of the United States. (These are commonly referred to as "forum selection clauses.") *Amici* accordingly have an even greater interest in urging that these forum selection clauses be enforceable in the United States.

Petitioner seeks a reversal of the decision below on the basis of a simple argument. Its major premise is that section 3(8) of COGSA,[1] 46 U.S.C. app. § 1303(8), invalidates forum selection clauses calling for foreign litigation. The minor premise is that foreign arbitration clauses should be treated in the same way, notwithstanding the strong federal policy favoring arbitration. If the Court accepts both of these premises, it would follow that foreign arbitration clauses are invalid under COGSA. If the Court rejects either of these premises, however, petitioner's argument fails and the decision below must be affirmed. *Amici* urge affirmance of the decision below and rejection of petitioner's major premise.

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[1] Section 3(8) of COGSA provides:

> Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this Act, shall be null and void and of no effect. A benefit of insurance in favor of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability.

The First Circuit assumed, *arguendo*, that petitioner's major premise was correct. *See* 29 F.3d at 730; Petition for Certiorari Appendix ("Petn. App.") at 7a-8a. This assumption, while consistent with a line of lower court authority in the United States starting with *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200 (2d Cir. 1967) (en banc), was wrong. The First Circuit then proceeded to reject petitioner's minor premise.

Although *amici* support both the First Circuit's result and its reasoning with respect to petitioner's minor premise, *amici* believe that it would be more appropriate to decide the case by rejecting petitioner's major premise. Properly understood, COGSA section 3(8) does not govern forum selection clauses. So holding is the most straight-forward way to resolve the present controversy, avoiding any possibility of conflict between two federal statutes. It also enables the Court to narrow an international conflict on the proper interpretation of the "Hague Rules" – the international treaty on which COGSA is based. *Compare, e.g., The Benarty*, 1985 Q.B. 325 (Eng. C.A. 1984), *with Indussa, supra; see generally* Michael F. Sturley, *International Uniform Laws in National Courts: The Influence of Domestic Law in Conflicts of Interpretation*, 27 VA. J. INT'L L. 729, 774-796 (1987). Finally, the enforceability of forum selection clauses is relevant in a far greater number of COGSA cases than is the enforceability of arbitration clauses.

Amici accordingly file this brief urging the Court to affirm the decision below on the basis that section 3(8)

does not govern forum selection clauses, and thus does not invalidate an arbitration clause.

SUMMARY OF ARGUMENT

As a general rule, forum selection clauses are enforceable in admiralty. Section 3(8) of COGSA does not change this general rule. Forum selection clauses in bills of lading should therefore be enforceable under the same standards as other forum selection clauses.

In *Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991), this Court held that the Limitation of Vessel Owner's Liability Act, 46 U.S.C. app. § 183c, does not prohibit forum selection clauses in cruise line passenger tickets. That reasoning applies at least as strongly in this context. The language of section 3(8) is less susceptible than section 183c to an interpretation that covers forum selection clauses, the legislative history of section 3(8) demonstrates a conscious decision *not* to cover forum selection clauses, and the policy behind section 3(8) reveals a weaker need to prohibit forum selection clauses.

The legislative history of section 3(8) and the *travaux préparatoires* of article 3(8) of the international convention on which COGSA is based (the "Hague Rules") both demonstrate that the draftsmen never intended the provision to apply to forum selection clauses. The principal model on which the international convention was based included a prohibition of forum selection clauses, but the international draftsmen decided that this was not an issue that the treaty should address. Article 3(8) was

intended to cover only issues relating to a carrier's substantive rights and responsibilities.

When Congress enacted COGSA, it had a wide range of options before it – including options that would have prohibited forum selection clauses. Congress nevertheless decided to enact the international convention, knowing that it was not intended to prohibit forum selection clauses.

Lower courts that have created a *per se* rule against forum selection clauses in bills of lading have erred. Acting without the benefit of the Hague Rules' *travaux préparatoires* or COGSA's legislative history, they were forced to guess at the intent of the draftsmen based on their views of what the draftsmen should have intended. They also acted without the benefit of this Court's teachings in *Carnival Cruise Lines*.

ARGUMENT

As a general rule, forum selection clauses are enforceable in admiralty. *See Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). The narrow question before this Court is whether section 3(8) of COGSA, 46 U.S.C. app. § 1303(8), changes this general rule with respect to forum selection clauses in bills of lading. Both this Court's precedents and the legislative history of COGSA demonstrate that section 3(8) does not have this effect. Forum selection clauses in bills of lading should therefore be enforceable under the same standards as other forum selection clauses.

I. This Court's Precedents Demonstrate that COGSA Section 3(8) Does Not Apply to Forum Selection Clauses

In *Carnival Cruise Lines, supra,* this Court held that the Limitation of Vessel Owner's Liability Act, 46 U.S.C. app. § 183c,[2] a statute closely analogous to COGSA section 3(8), does *not* prohibit forum selection clauses in cruise line passenger tickets. *See* 499 U.S. at 595-597. The Court,

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[2] The Limitation of Vessel Owner's Liability Act provides, in relevant part:

> It shall be unlawful for the . . . owner of any vessel transporting passengers between ports of the United States or between any such port and a foreign port to insert in any . . . contract . . . any provision or limitation (1) purporting, in the event of loss of life or bodily injury arising from the negligence or fault of such owner or his servants, to relieve such owner . . . from liability, or from liability beyond any stipulated amount, for such loss or injury, or (2) purporting in such event to lessen, weaken, or avoid the right of any claimant to a trial by court of competent jurisdiction on the question of liability for such loss or injury, or the measure of damages therefor. All such provisions or limitations contained in any such . . . contract . . . are declared to be against public policy and shall be null and void and of no effect.

46 U.S.C. app. § 183c. Since this Court's decision in *Carnival Cruise Lines,* Congress has amended section 183c twice. The second amendment reversed the first, however, so the statute is currently the same as it was at the time of *Carnival Cruise Lines. See* Coast Guard Authorization Act of 1993, Pub. L. No. 103-206, § 309, 107 Stat. 2419, 2425 (1993); Oceans Act of 1992, Pub. L. No. 102-587, § 3006, 106 Stat. 5039, 5068 (1992).

applying *The Bremen, supra,*[3] reasoned that section 183c prohibits a carrier from lessening its liability directly, but does not apply to a clause selecting the court to determine a carrier's liability. This is true even if the provision causes a plaintiff unreasonable hardship and thus reduces the carrier's liability indirectly. *See* 499 U.S. at 596.

The *Carnival Cruise Lines* reasoning applies at least as strongly in this context. Petitioner here makes exactly the kind of indirect burden argument as did the *Carnival Cruise Lines* respondents. *See* Brief for the Respondents, *Carnival Cruise Lines* (No. 89-1647), at 34. But the language of section 3(8) is far less susceptible to an interpretation covering forum selection clauses. Section 183c contains two parts. *See supra* note 2. The first prohibits general exculpatory clauses in passenger tickets, while the second specifically prohibits clauses that lessen "the right of any claimant to a trial by court of competent jurisdiction." The second part of section 183c could plausibly have been read as prohibiting forum selection clauses, *see* 499 U.S. at 602-605 (STEVENS, J., dissenting), although a majority of this Court rejected that interpretation. But section 3(8) of COGSA is closely analogous to section 183c *without the second part. See supra* note 1. If section 183c with its more directly applicable language was insufficient to cover forum selection clauses, section 3(8) should not be construed to cover them with more general language that does not address the issue.

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[3] In *The Bremen,* this Court did not address the specific question now before it. *See* 407 U.S. at 10 n.11. But that decision nevertheless supports the result advocated here.

The *Carnival Cruise Lines* Court placed heavy emphasis on the fact that nothing in the legislative history of section 183c suggested a desire to prohibit forum selection clauses. *See* 499 U.S. at 596. Likewise, nothing in COGSA's legislative history suggests a desire to prohibit forum selection clauses. Moreover, the drafters of COGSA section 3(8) and the corresponding article 3(8) of the Hague Rules were well aware of the present issue, but they chose *not* to prohibit forum selection clauses. *See* Part II, *infra* pages 11-21.

Finally, the policy considerations that motivated the Court in *Carnival Cruise Lines* apply with at least as much force here. If any distinction should be made between cruise line passengers and multinational companies engaged in the business of shipping goods to or from the United States, it seems self-evident that the former have the greater need for the "consumer protection" that petitioner advocates. It would be anomalous to hold that an inequality of bargaining power (which was considered irrelevant in *Carnival Cruise Lines, see* 499 U.S. at 593) requires protection for insurance companies such as petitioner and its supporting *amici* when individual consumers have been denied the same protection. Any factual distinctions (such as the notice received by the Shutes compared to the notice received by petitioner,[4] *see* Petn. at 19 n.15) may be relevant to the "judicial scrutiny for fundamental fairness" that this Court has preserved,

[4] In view of the notice actually received by the Shutes ("as much as three pages of fine print" could communicate, 499 U.S. at 590), it is doubtful whether the difference here offers any meaningful factual distinction in petitioner's favor.

499 U.S. at 585, but they should play no role in deciding whether section 3(8) imposes a *per se* rule prohibiting all forum selection clauses.[5]

II. COGSA Section 3(8) and the Corresponding Article 3(8) of the Hague Rules Were Never Intended to Apply to Forum Selection Clauses

Just as the *Carnival Cruise Lines* Court considered it relevant to consult the legislative history of section 183c, *see* 499 U.S. at 596, it is important here to consider the history of COGSA. The task has two facets because COGSA is not simply a domestic statute; it is also the U.S. enactment of an international treaty popularly known as the Hague Rules.[6] *See, e.g., Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297, 301 (1959); Michael F. Sturley, *The History of COGSA and the Hague Rules*, 22 J. MAR. L. & COM. 1, 36-55 (1991).

Congress made some changes in the text of the Hague Rules. *See, e.g., id.* at 50. On most issues, however,

[5] Because this Court has preserved "judicial scrutiny for fundamental fairness," 499 U.S. at 585, affirming the First Circuit on the grounds suggested here would not be an invitation to the abuse of forum selection clauses. The general scrutiny applicable in every admiralty context provides all the protection that plaintiffs legitimately require.

[6] Brussels Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Aug. 25, 1924, 51 Stat. 233, T.S. No. 931, 120 L.N.T.S. 155. This international convention is widely known as the "Hague Rules" because it is a modified version of the rules adopted by the International Law Association at the Hague Conference in 1921. *See generally* Sturley, *History, supra*, 22 J. MAR. L. & COM. at 22-32.

Congress' principal goal was to give effect to the international treaty. *See, e.g.*, 79 CONG. REC. 13341 (1935) (Sen. White), *reprinted in* 1 THE LEGISLATIVE HISTORY OF THE CARRIAGE OF GOODS BY SEA ACT AND THE TRAVAUX PRÉPARATOIRES OF THE HAGUE RULES 589 (M. Sturley ed. 1990) [*hereinafter* LEGISLATIVE HISTORY]; *id.* at 8954 (Sen. Thomas), *reprinted in* 1 LEGISLATIVE HISTORY at 587, S. REP. NO. 742, 74th Cong., 1st Sess. 4 (1935), *reprinted in* 1 LEGISLATIVE HISTORY at 534; H.R. REP. NO. 2218, 74th Cong., 2d Sess. 6 (1936), *reprinted in* 1 LEGISLATIVE HISTORY at 526. Section 3(8) is one of the many COGSA provisions that is substantially identical to the corresponding provision in the Hague Rules.[7] It is accordingly appropriate to consider both the international *travaux préparatoires* of the treaty and the domestic legislative history of the statute to determine the proper scope of section 3(8).

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[7] Article 3(8) of the Hague Rules provides:

> Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault, or failure in the duties and obligations provided in this *article*, or lessening such liability otherwise than as provided in this *convention*, shall be null and void and of no effect. A benefit of insurance in favor of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability.

51 Stat. at 250-251, 120 L.N.T.S. at 165. The only substantial differences between article 3(8) and COGSA section 3(8) are indicated by *italics*.

A. The International *Travaux Préparatoires*

The movement toward international uniformity on the rules governing bills of lading began over a century ago. *See generally* Sturley, *History, supra*, 22 J. MAR. L. & COM. at 6-9. Forum selection clauses were an important issue in the industry even then. U.S. cargo interests were particularly upset with forum selection clauses requiring claims to be litigated in England. *See, e.g., id.* at 10-11 & n.65 (citing H.R. REP. NO. 1988, 52d Cong., 1st Sess. 2 (1892); 24 CONG. REC. 172 (1892) (Rep. Coombs)). Despite this pressure, when Congress enacted the 1893 Harter Act, 46 U.S.C. app. §§ 190-196, it did not prohibit forum selection clauses.

In other countries, the cargo interests' opposition was more powerful. In 1904, Australia passed a statute along the lines of the Harter Act but explictily banning forum selection clauses. *See* Sea-Carriage of Goods Act 1904, No. 14, § 6 (Austl.). In 1911, New Zealand followed Australia's lead. *See* Shipping and Seaman Amendment Act, 1911, No. 37, § 9 (N.Z.). And in 1919, French Morocco did the same. *See* Code de Commerce Maritime, art. 264 (Morocco, French Zone, Mar. 31, 1919) (summarized in FRANCESCO BERLINGIERI, NOTES ON THE HAGUE RULES, 1921, at 25 n.1 (1922), *reprinted in* 2 LEGISLATIVE HISTORY, *supra*, at 524).

The most relevant example of foreign opposition to forum selection clauses is found in Canada. In 1910, Canada passed its statute modeled on the Harter Act, but section 5 explicitly provided:

> [A]ny stipulation or agreement purporting to oust or lessen the jurisdiction of any court having jurisdiction at the port of loading in Canada in respect of the bill of lading or document [of title], shall be illegal, null and void, and of no effect.

Water Carriage of Goods Act 1910, 9-10 Edw. 7, ch. 61, § 5 (Can.). The Canadian example is particularly relevant because the 1910 Canadian Act was the principal model for the Hague Rules. *See, e.g.*, 2 INTERNATIONAL LAW ASSOCIATION, REPORT OF THE 30TH CONFERENCE 160 (Hague Conference 1921) [*hereinafter* HAGUE CONFERENCE REPORT] (statement of Sir Norman Hill) ("We had to give effect to the Canadian Act"), *reprinted in* 1 LEGISLATIVE HISTORY, *supra*, at 266. Indeed, the principal impetus for the adoption of the Hague Rules was the British government's commitment to "uniform legislation throughout the Empire on the lines of the existing Acts dealing with shipowners' liability, but based more precisely on the Canadian Water Carriage of Goods Act, 1910." Imperial Shipping Committee, *Report on the Limitation of Shipowners' Liability by Clauses in Bills of Lading*, Cmd. 1205, at 9 (1921), *reprinted in* 2 LEGISLATIVE HISTORY, *supra*, at 138; *see* Sturley, *History*, *supra*, 22 J. MAR. L. & COM. at 18-21.

No provision in the Hague Rules prohibits forum selection clauses – despite the existence of an express provision to that effect in the principal model from which the Hague Rules draftsmen were working, despite similar provisions in three other statutes (and a proposed

statute[8]) considered by the draftsmen, and despite cargo interests' frequently expressed dissatisfaction with forum selection clauses. The conclusion appears self-evident: the Hague Rules were not intended to prohibit forum selection clauses.

Moreover, we know *why* the Hague Rules fail to follow the Canadian example on this point. The draftsmen made a deliberate decision not to prohibit forum selection clauses. At the London Conference of the Comité Maritime International (where the draft to be discussed by the international delegates received its final polishing before submission to the diplomatic conference, *see* Sturley, *History*, *supra*, 22 J. MAR. L. & COM. at 27-28), the delegates discussed some of the issues for which the rules made no provision. James Petrie, a British delegate, addressed forum selection clauses:

> I think this is a fitting moment just to mention something which was observed at [the International Law Association meeting in] Buenos-Aires. It is a matter of another lacuna, something missing, in the Hague Rules. . . . [T]he Argentine people, who are very interested in the Hague Rules and approve of them in substance, made one reservation, and that was that the Hague Rules did not contain any proviso as to jurisdiction. The Argentines passed a Resolution to the effect that they desired the International

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[8] When the Hague Rules were being drafted, proposed legislation in France would also have banned forum selection clauses in bills of lading. The delegates at the Hague discussed this aspect of the proposed legislation. *See* HAGUE CONFERENCE REPORT, *supra*, at 182-183, *reprinted in* 1 LEGISLATIVE HISTORY, *supra*, at 288-289.

> Law Association to recommend to the International Shipping Conference and to the Chamber of Shipping of the United Kingdom the following measure. That all disputes relative to the discharge of cargo should be settled at the port of destination, and by the Courts of the country of destination. You will easily see that this motion . . . met, on the part of the British delegates and other European delegates, with a great deal of opposition . . . . [Robert Temperley, another British delegate] suggested that we should just say that the Association were of opinion that that question of jurisdiction, which is not included in the present draft of the Hague Rules, should receive the consideration of competent bodies like the Comité Maritime International.

COMITÉ MARITIME INTERNATIONAL, LONDON CONFERENCE, OCTOBER 1922, at 405-407 (Bulletin no. 57), *reprinted in* 2 LEGISLATIVE HISTORY, *supra*, at 415-417. The CMI delegates, however, made no change in response to this observation. Directly after James Petrie spoke, Louis Franck (the president of the Comité Maritime International and the presiding officer of the subsequent diplomatic conference) attempted to summarize the sense of the delegates. He responded to the Argentine proposal directly:

> Then I hear that it has been suggested that we should increase the burden of the proposed Convention and of the Rules and include such matters as jurisdiction in it. . . . But surely this is not a system or a problem which only arises about the negligence clauses and we cannot bring it in here.

Id. at 411, *reprinted in* 2 LEGISLATIVE HISTORY, *supra*, at 421. In short, the forum selection problem was specifically raised, but there was general agreement that it was an issue beyond the scope of the Hague Rules. No further attempt was made to include a provision governing forum selection clauses.

Article 3(8) was instead designed to accomplish certain specific goals having nothing to do with forum selection clauses. Most importantly, it prohibited a carrier from disclaiming liability for its own negligence (except as permitted by the Rules). Thus the prohibition of "negligence clauses" features prominently in the *travaux préparatories*. *See, e.g.*, CONFÉRENCE INTERNATIONALE DE DROIT MARITIME, RÉUNION DE LA SOUS-COMMISSION, BRUXELLES 1923, at 35-36, *translated in* 1 LEGISLATIVE HISTORY, *supra*, at 425. A carrier could not reduce the obligations imposed on it by article 3, *see, e.g., id.* at 119, *translated in* 1 LEGISLATIVE HISTORY, *supra*, at 506, nor claim greater rights than those granted by article 4, *see, e.g., id.* at 38, *translated in* 1 LEGISLATIVE HISTORY, *supra*, at 428. In particular, a carrier could not reduce its liability per package below the article 4 (5) sum. *See, e.g.,* HAGUE CONFERENCE REPORT, *supra*, at 140, *reprinted in* 1 LEGISLATIVE HISTORY, *supra*, at 246. But all of these issues relate to the carrier's substantive rights and responsibilities. Matters viewed as "procedural," such as where suits under the Rules would be heard, were left to national law. In the United States, the governing national law is now set forth in *Carnival Cruise Lines* and *The Bremen*.

B. The Domestic Legislative History

Congress had ample opportunity to consider whether and how it would enact the Hague Rules. Between 1923 and 1936, no fewer than a dozen bills were introduced for this purpose, and the president also sought the advice and consent of the Senate on the international convention. During this period, six Congressional hearings were held on the subject, and three Congressional reports were issued. *See generally* Sturley, *History, supra*, 22 J. MAR. L. & COM. at 39-55. Furthermore, legislation based on the Hague Rules was not the only option before Congress. A series of bills introduced by Senator Knute Nelson and Congressmen (later Senator) K.D. McKellar covered the same ground in radically different fashion. *See id.* at 38. In particular, the Nelson-McKellar bills would have prohibited forum selection clauses purporting to oust or lessen the jurisdiction of the U.S. courts. *Id.* at 38 & n.303 (citing S. 427, 68th Cong., 1st Sess. § 3 (1923)).[9]

Congress, of course, was not required to choose between unwavering support for the international convention and a purely domestic solution such as the Nelson-McKellar bills. Congress could – and did – enact

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[9] The contemporary significance of the forum selection provision in these bills is illustrated by Congressman McKellar's characterization of it as one of "[t]he two main things" in the proposal. *Navigation of Vessels: Hearing on H.R. 8753 Before the House Committee on the Merchant Marine and Fisheries*, 63d Cong., 2d Sess. 7 (1914). It would be implausible to suggest that Congress failed to address forum selection clauses because they were not perceived as a problem at the time. In the bill of lading context, many people clearly did perceive them as a problem, and this was well known to Congress.

the provisions of the treaty with changes or additions considered suitable. In fact, sections 9 to 16 of COGSA, 46 U.S.C. app. § 1309-15, are purely domestic law, and have no counterpart in the Hague Rules. On the forum selection issue, Congress could have followed the example of Australia, which enacted the Hague Rules in 1924 with an additional provision explicitly prohibiting forum selection clauses. *See* Sea-Carriage of Goods Act 1924, No. 22, § 9(2) (Aust1.). Faced with this wide range of choices, however, Congress enacted the Hague Rules (which were not intended to prohibit forum selection clauses) without making any provision to modify the international understanding in this regard.

Congress' decision to enact the Hague Rules without relevant modification is particularly significant, for the international understanding had been called to Congress' attention. In *Maharani Woollen Mills Co. v. Anchor Line*, [1927] 29 Lloyd's Rep. 169 (Eng. C.A.), cargo claimants sued in England despite a forum selection clause in the bill of lading calling for suit in India. The trial court dismissed the case on the basis of the clause. On appeal, the plaintiffs argued that article 3(8) of the Hague Rules (then in force in Britain under the Carriage of Goods by Sea Act, 1924, 14 & 15 Geo. 5, ch. 22, sch., r. 3(8) (U.K.)), invalidated the forum selection clause because it reduced the carrier's liability. Lord Justice Scrutton, the great commercial judge of his generation and a noted authority on the carriage of goods by sea, quickly rejected this argument:

> [T]he liability of the carrier appears to me to remain exactly the same under the [forum selection] clause. The only difference is a question of

> procedure – where shall the law be enforced? – and I do not read any clause as to procedure as lessening liability.

29 Lloyd's Rep. at 169. The *Maharani Woollen Mills* decision not only established the law for England, it was summarized for Congress during the Senate hearing on the bill that became COGSA as an example of how foreign courts applied the Hague Rules. *See The Carriage of Goods by Sea: Hearing on S. 1152 Before the Senate Committee on Commerce*, 74th Cong., 1st Sess. 85 (1935) [*hereinafter 1935 Senate Hearing*], *reprinted in* 3 LEGISLATIVE HISTORY, *supra*, at 587; *see also id.* at 86 (citing *The Media*, [1931] 41 Lloyd's Rep. 80 (Eng. K.B.) (following *Maharani Woollen Mills Co. v. Anchor Line*)), *reprinted in* 3 LEGISLATIVE HISTORY, *supra*, at 588.[10] It is clear that the forum selection clause issue was squarely presented to Congress.

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[10] Relevant Belgian cases were also cited to Congress. Although the Belgian courts disapproved choice-of-law clauses in several of these cases, they upheld forum selection clauses under the Belgian enactment of the Hague Rules. *See 1935 Senate Hearing*, *supra*, at 88, *reprinted in* 3 LEGISLATIVE HISTORY, *supra*, at 590. In view of the heavy emphasis during the Congressional hearings on the British experience with its COGSA, the English cases are undoubtedly more relevant. *See, e.g., id.* at 29 (statement of A.B. Barber), *reprinted in* 3 LEGISLATIVE HISTORY, *supra*, at 531; *id.* at 66 (statement of James Sinclair), *reprinted in* 3 LEGISLATIVE HISTORY, *supra*, at 568; *Uniform Ocean Bills of Lading: Hearings on S. 1152 Before the House Committee on Merchant Marine and Fisheries*, 74th Cong., 2d Sess. 18-20 (1936) (Justice Department memorandum comparing the pending bill with the British Act), *reprinted in* 3 LEGISLATIVE HISTORY, *supra*, at 616-618.

The domestic legislative history contains no evidence of any desire to depart from the international understanding regarding forum selection clauses or the role of section 3(8). Indeed, the domestic legislative history closely mirrors the international *travaux préparatoires*. Section 3(8)'s primary purpose was seen as prohibiting carriers from exempting themselves from liability beyond what the Act permitted. *See, e.g.*, H.R. REP. NO. 2218, 74th Cong., 2d Sess. 6-7 (1936), *reprinted in* 1 LEGISLATIVE HISTORY, *supra*, at 526-527; *1935 Senate Hearing*, *supra*, at 46, *reprinted in* 3 LEGISLATIVE HISTORY, *supra*, at 548; *Uniform Ocean Bills of Lading: Hearings on S. 1152 Before the House Committee on Merchant Marine and Fisheries*, 74th Cong., 2d Sess. 95-96 (1936) [*hereinafter 1936 House Hearing*], *reprinted in* 3 LEGISLATIVE HISTORY, *supra*, at 693-694. A carrier's inability to reduce the package limitation was again cited as an example. *See, e.g., 1935 Senate Hearing*, *supra*, at 37, *reprinted in* 3 LEGISLATIVE HISTORY, *supra*, at 539; *1936 House Hearing*, *supra*, at 100, *reprinted in* 3 LEGISLATIVE HISTORY, *supra*, at 698. Every time that section 3(8) is raised, the concern is with the carrier's substantive rights and responsibilities. There is never any suggestion that forum selection clauses would be affected.

III. The Lower Courts That Have Created a *Per Se* Rule Against Forum Selection Clauses in Bills of Lading Are In Error

This Court has not decided whether forum selection clauses in bills of lading are enforceable. The Court could have decided the issue in *The Monrosa v. Carbon Black*

Export, Inc., 359 U.S. 180 (1959),[11] but it dismissed the writ of certiorari as improvidently granted. In *The Bremen*, *supra*, the Court specifically noted that COGSA did not govern the case. *See* 407 U.S. at 10 n.11. And *Knott v. Botany Mills*, 179 U.S. 69 (1900), which some have thought relevant,[12] involved neither COGSA nor a forum selection clause.

A number of lower courts have created a *per se* rule against forum selection clauses in bills of lading. *See, e.g., Indussa Corp. v. S.S. Ranborg*, *supra*. These decisions are simply wrong. The courts that announced them did not

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[11] The parties in *The Monrosa* had briefed the section 3(8) issue. *See* Brief for the Respondent, *The Monrosa* (No. 178), at 21-25; Reply Brief for the Petitioners at 10-14.

[12] Petitioner argues that *Knott* is on point. *See* Petitioner's Brief at 13-14. The relevant issue in *Knott* was "whether the first section of the Harter Act applies to a foreign vessel on a voyage from a foreign port to a port of the United States." 179 U.S. at 74. (Harter Act § 1 governs "any vessel transporting merchandise or property from or between ports of the United States and foreign ports." 46 U.S.C. app. § 190.) The Court held that the Harter Act did apply and ignored the bill of lading's inconsistent choice-of-law clause. Having determined that the Harter Act applied, the Court then used the Act's prohibition against exculpatory clauses to void a bill of lading clause that purported to exempt the carrier from liability for its own negligence. *See* 179 U.S. at 77. Contrary to petitioner's suggestion, the Court did not use this statutory prohibition to void the choice-of-law clause. Indeed, it would have been logically inconsistent to apply the Act's prohibition without deciding whether the Act itself applied. Once the decision to apply the Harter Act had been made, however, the choice-of-law clause was irrelevant. The relevant Harter Act provision was not the one prohibiting exculpatory clauses but the one expressing Congress' desire to have U.S. courts apply the Act to every vessel in the U.S. trade.

have the benefit of the Hague Rules' *travaux préparatoires* or of COGSA's legislative history, as these materials were not widely available before 1990. *See* 1 LEGISLATIVE HISTORY, *supra*, at vii. The courts were accordingly forced to guess at the intent of the draftsmen based on their views of what the draftsmen should have intended.

The courts that developed the *per se* rule also acted without the benefit of this Court's teachings in *Carnival Cruise Lines*. More recent decisions have already questioned whether the *Indussa* line of cases can survive these developments. Indeed, the court below expressed precisely these concerns. *See* 29 F.3d at 730; Petn. App. at 7a (noting "the arguably tremulous ground on which *Indussa* and its progeny currently sit"). *See also Fabrica de Tejidos la Bellota S.A. v. M/V Mar*, 799 F. Supp. 546, 561 (D. V.I. 1992); *Nissho Iwai American Corp. v. M/V Sea Bridge*, 1991 AMC 2070, 2079-80 (D. Md. 1991); *but see Underwriters at Lloyd's of London v. M/V "Steir,"* 773 F. Supp. 523, 524-527 (D. P.R. 1991) (distinguishing *Carnival Cruise Lines*).

Like the courts that established the *per se* rule, petitioner argues against the decision below based on its view of the appropriate balance between carrier interests and cargo interests. The appropriate balance, however, was struck at a series of international conferences at which the affected interests reached a compromise agreement. *See generally* David C. Frederick, *Political Participation and Legal Reform in the International Maritime Rulemaking Process: From the Hague Rules to the Hamburg Rules*, 22 J. MAR. L. & COM. 81, 86-93 (1991). Under this compromise, some risks are borne by carriers and their insurers; others by cargo owners and their insurers. The international diplomatic community then adopted this

compromise in the Hague Rules and Congress enacted it in COGSA. It is not the courts' function to revise these judgments based on their views of what an appropriate balance should have been.

CONCLUSION

The decision of the First Circuit should be affirmed on the ground that section 3(8) of COGSA does not prohibit forum selection clauses, and thus has no impact on arbitration clauses.

Respectfully submitted,

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February 21, 1995